TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 234

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY AND THE NEW YORK AND HARLEM RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

THE CITY OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED JANUARY 28, 1901.

(18,028.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 12, 1901.

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a STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the court of appeals held at the capitol, in the city of Albany, on the 22nd day of June, in the year of our Lord one thousand nine hundred, before the judges of said court.

Witness: the Hon. Alton B. Parker, chief judge, presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur, June 22nd, 1900.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY and Another to Vacate Assessments.

Be it remembered, that on the 16th day of May in the year of our Lord one thousand nine hundred, The New York Central and Hudson River Railroad Company and another the appellants, in this proceeding came here into the court of appeals by Ira A. Place, their attorney, and filed in the said court a notice of appeals and the return thereto from the order of the appellate division of the supreme court in and for the first judicial department. And The City of New York, the respondent in said proceedings afterward appeared in the court of appeals, by John Whalen, corporation counsel, its attorney.

Which said notice of appeal and the return thereto filed as aforesaid are hereunto annexed.

Whereupon the said court of appeals having heard this proceeding argued by Mr. Ira A. Place, of counsel for the appellants and by Mr. Theodore Connoly, of counsel for the respondent, and

b after due deliberation had thereon, did order and adjudge that the order of the appellate division of the supreme court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the record aforesaid and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with costs as aforesaid.

And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York before the justices thereof according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof etc.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of appeals, clerk's office.

ALBANY, *June* 23*rd*, 1900.

I hereby certify that the preceding record contains a correct transcript of the proceeding- in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.]

W. H. SHANKLAND, *Clerk.*

c In the Court of Appeals.

In the Matter of the Petition of THE N. Y. C. & H. R. R. R. Co. and THE N. Y. & H. R. R. Co. to Vacate Assessments (1) for Regulating, &c., Vanderbilt Avenue East, (2) Paving Park Avenue; Confirmed Feb. 17, 1899.

Papers on Appeal from Order.

Ira A. Place, attorney for petitioners and appellants, Grand Central station, borough of Manhattan, N. Y. city, N. Y.

John Whalen, counsel to the corporation of the city of New York, respondent, 2 Tryon row, borough of Manhattan, N. Y. city, N. Y.

d Supreme Court, New York County.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23rd and 24th Wards to 177th Street, Confirmed February 17, 1899.

Statement under Rule 41.

This proceeding was commenced by the service of the petition with notice of motion on John Whalen, Esq., corporation counsel of the city of New York, on the 18th day of March, 1899, and by the application upon such petition to the Honorable Charles H. Truax, a justice of the supreme court, in special term, pursuant to section 959 of the Greater New York charter.

The names of the original parties are as they appear in the above-entitled proceeding in full. No change in parties or attorneys has taken place pending the proceeding.

1 Supreme Court, New York County.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23d and 24th Wards to 177th Street, Confirmed February 17, 1899.

SIR: Take notice that the annexed petition will be presented to the supreme court of the State of New York, at a special term thereof, to be held at special term, part II, in the county court courthouse, in and for the city and county of New York, on the 28th day of March, 1899, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, and that then and there
2 an application will be made to a justice of this court, sitting at said special term, that the proofs and allegations of the parties in respect to the several matters in the said petition set forth be then and there heard, and that thereupon a motion will be made that the prayer of the petitioners be granted.

Dated New York, March 16, 1899.

IRA A. PLACE,
Attorney for Petitioners.

Office and P. O. address, Grand Central station, borough of Manhattan, New York city, N. Y.

To John Whalen, Esq., counsel to the corporation of the city of New York.

Adjourned by consent to April 13, 1899, same time and place.
New York, March 27th, 1899.

JOHN WHALEN,
Corporation Counsel.
G. L. S.

"This matter coming on for a hearing before Hon. Charles H. Truax, one of the justices of this court, on April 13, 1899, on consent of the counsel for the respective parties; it is

Ordered that the testimony be taken before a stenographer at the office of the corporation counsel and presented to me for decision at a time and place to be hereafter determined upon.

CHARLES H. TRUAX, *Justice.*"

3 *Petition Read by Petitioners.*

Supreme Court, New York County.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23d and 24th Wards to 177th Street, Confirmed February 17, 1899.

To the supreme court of the State of New York:

The petitioners in the above-entitled matter respectfully show to this court:

I. That the petitioner The New York and Harlem Railroad Company is a railroad corporation, duly organized and existing under the laws of the State of New York, and is now, and at the date of the confirmation and entry of record of the assessments here-
4 inafter named was, the owner in fee of the premises situated in the twenty-fourth ward, in the borough of the Bronx, in the city of New York, hereinafter specifically mentioned, and upon which the said assessments have been made, laid or imposed.

II. That the petitioner The New York Central and Hudson River Railroad Company is a railroad corporation duly organized and existing under the laws of the State of New York, and is the lessee of the railroad and lands of the petitioner The New York and Harlem Railroad Company, extending from 42d street in the borough of Manhattan, in the city of New York, through the said 24th ward, and to the village of Chatham, in the county of Columbia, under a contract or lease dated April 1, 1873, for a term expiring April 1, 2274, and that as such lessee it is now, and at the date of the confirmation and entry of record of the assessments hereinafter named was, the occupant of the said premises situated in the 24th ward of the borough of the Bronx, in the city of New York, hereinafter specifically mentioned, and upon which assessments have been made, laid or imposed, and was using the said premises for the purpose of its incorporation, and that under the terms of the said contract or lease the said petitioner The New York Central and Hudson River Railroad Company covenants and agrees to pay all taxes, charges or assessments, ordinary and extraordinary, that may be imposed or assessed in any way upon the said lands.

III. That by reason of the making, laying or imposing of said assessments upon the said premises of your petitioners, your petitioners and each of them are aggrieved.

IV. That the assessment first above mentioned for regulat-
5 ing and grading, setting curbstones, flagging and laying cross-walks in Vanderbilt avenue east, from Ward line to

177th street, purports to have been made, laid or imposed under an ordinance of the board of aldermen of the mayor, aldermen, and commonalty of the city of New York, adopted October 23, 1894, approved by the mayor October 31, 1894, a copy of which is hereto annexed and marked "Exhibit A," and made a part of this petition which said ordinance was adopted under and pursuant to the provisions of section 878 of the consolidation act, which was then in full force and effect; and that said assessment secondly above mentioned for paving Park avenue, otherwise Vanderbilt avenue east, from the division line between the 23d and 24th wards to 177th street, purports to have been made, laid or imposed under an ordinance of the board of aldermen, of the mayor, aldermen and commonalty of the city of New York, adopted January 5, 1897, approved by the mayor January 19, 1897, a copy of which is hereto annexed and marked "Exhibit B," and made a part of this petition, which said ordinance was adopted under and pursuant to the provisions of section 878 of the consolidation act, which was then in full force and effect.

V. That the assessment first above mentioned for regulating and grading, setting curbstones, flagging and laying cross-walks in Vanderbilt avenue east, from Ward line to 177th street, is an assessment of $4,687.82 made, laid or imposed upon lands described by assessment, block and lot numbers as follows:

Assessment No.	Block No.	Lot No.	Amount.
1	1219	90	
1½	1219	84	
2	1208	6	$4,687.82
3	1180½	1	
4	1146½	1	

6 That the said lands and premises described by assessment Nos., by block Nos. and by lot Nos., as aforesaid, are the lands owned, occupied and used by your petitioners, as hereinbefore set forth.

That the said assessment secondly above mentioned for paving Park avenue, otherwise Vanderbilt avenue east, from the division line between the 23d and 24th wards to 177th street, is an assessment of $12,626.72, made, laid or imposed upon lands described by assessment, block and lot numbers, as follows:

Assessment No.	Block No.	Lot No.	Amount.
1	2895	45	
1½	2895	85	
2	2897	5	
3	2898	60	
3	2899	70	
4	2900	90	
4	2900	107	$12,542.03
68	2895	11	84.69
			$12,626 72

That the said lands and premises described by assessment Nos., by block Nos. and by lot Nos. as aforesaid are the lands owned, occupied and used by your petitioners as hereinbefore set forth, and, with the exception of assessment No. 68, block No. 2895, lot No. 11, are the same lands and premises as are described by the assessment Nos., block Nos. and lot Nos. upon which the said assessment first above mentioned was made, laid or imposed.

VI. That the said lands owned, occupied and used as aforesaid by your petitioners are shown by green shading and delineated upon a map or tracing thereof which is hereto annexed and marked "Exhibit C," and hereby made a part of this petition.

7 VII. That *that* the said assessment first above mentioned for regulating and grading, setting curbstones, flagging and laying cross-walks in Vanderbilt avenue east, from ward line to 177th street, was made, laid or imposed by the board of assessors of the city of New York on or before November 15, 1898, and upon notice thereof being given the petitioners appeared before the said board of assessors on or about December 16, 1898, and then and there duly objected and protested against the said assessment and filed written objections thereto, on the ground that substantial error had been made in the making, laying or imposing of the said assessment, and that thereafter the said board of assessors, disregarding the said objections and protest of your petitioners, overruled the said objections of your petitioners and against their protest confirmed the said assessment; and that thereafter and on or about February 17, 1899, your petitioners appeared before the board of revision of assessments of the city of New York, and again objected and protested against the making, laying or imposing of the said assessment, but that the said objections were overruled by the said board of revision of assessments and against said protest of your petitioners said board of revision and assessment confirmed the said assessment, and that the title of said assessment has been entered in the record of the titles of assessments confirmed in the office of the collector of assessments and arrears of said city, and in the office of the comptroller of said city, and constitutes a lien or apparent lien or incum-

brance upon the said lands of your petitioners and a cloud upon the title of your petitioners thereto.

VIII. That the said assessment secondly above mentioned
8 for paving Park avenue, otherwise Vanderbilt avenue east, from the division line between the 23d and 24th wards to 177th street, was made, laid or imposed by the board of assessors of the city of New York on or before December 20, 1898, and upon notice thereof being given the petitioners appeared before the said board of assessors on or about January 24, 1899, and then and there duly objected and protested against the said assessment and filed written objections thereto, on the ground that substantial error had been made in the making, laying or imposing of the said assessment, and that thereafter the said board of assessors, disregarding the said objections and protest of your petitioners, overruled the said objections of your petitioners and against their protest confirmed the said assessment; and that thereafter and on or about February 17, 1899, your petitioners appeared before the board of revision of assessments of the city of New York, and again objected and protested against the making, laying or imposing of the said assessment, but that the said objections were overruled by the said board of revision of assessments and against said protest of your petitioners said board of revision and assessments confirmed the said assessment, and that the title of said assessment has been entered in the record of the titles of assessments confirmed in the office of the collector of assessments and arrears of said city, and in the office of the comptroller of said city, and constitutes a lien or apparent lien or incumbrance upon the said lands of your petitioners and a cloud upon the title of your petitioners thereto.

IX. Your petitioners further show that the said lands of your petitioners hereinbefore mentioned and upon which the said assessments have been made, laid or imposed, are held, owned,
9 used and occupied as aforesaid solely, only and exclusively for the purposes of the incorporation of your petitioners, and that all of the said lands which abut or are contiguous to the said Park avenue, or Vanderbilt avenue east, are used solely, only and exclusively for the purposes of the roadway of your petitioners upon which their tracks and over which the trains of your petitioner, The New York Central and Hudson River Railroad Company, are run, and that there are no buildings or other improvements upon the said lands excepting railroad tracks and structures.

X. Your petitioners further show that the grade of the said Park avenue, or Vanderbilt avenue east, is from 10″ 5′ to 18″ 3′ above the level of the grade of the roadway and tracks of your petitioners, as shown upon the cross-sections thereof which are hereto annexed and marked "Exhibit D," which is hereby made a part of this petition, and that there is no access possible from the said lands of your petitioners to the said Vanderbilt avenue east, but, upon the contrary, that the said lands and roadway of your petitioners were heretofore under a contract made by and between the department of public parks in the city of New York and your petitioner, The New York and Harlem Railroad Company, dated January 11, 1888, which said

contract was made, entered into, executed and carried out under the provisions of chapter 721 of the Laws of 1887, depressed to their present grade and solid stone retaining walls built upon and along the easterly and westerly sides of the said lands in order that access to and from public streets and avenues, including that part of Park avenue, or Vanderbilt avenue east, between said ward line and 177th street, should be cut off and rendered impossible.

10 XI. That the total amount of the said assessment first above mentioned for regulating and grading, setting curb-stones, flagging and laying cross-walks in Vanderbilt avenue east, from ward line to 177th street, is $10,994.41, of which the said sum of $4,687.82 was made, laid or imposed upon the land of your petitioners as aforesaid; that the total amount of the said assessment secondly above mentioned for paving Park avenue, otherwise Vanderbilt avenue east, from the division line between the 23d and 24th wards to 177th street, is $26,167.14, of which the said sum of $12,626.72 was made, laid or imposed upon the land of your petitioners as aforesaid.

XII. And your petitioners further show that the improvements for which the said assessments have been made, laid or imposed are local improvements, and that in the said proceedings under which the said assessments have been made, laid or imposed substantial errors have been committed, among which are the following:

First. That the said lands owned, occupied and used by your petitioners as aforesaid and upon which said assessments have been made, laid or imposed are not houses and lots within the meaning of the said ordinances and statutes, and that the said lands owned, occupied and used by your petitioners, as aforesaid, have not been, will not be, and cannot be, benefitted in any manner by the said improvements.

Second. That there was and is no authority of law for the assessment upon the said lands owned, occupied and used by your petitioners as aforesaid, and upon which said assessments have been made, laid or imposed for the total cost or any part of the cost of the said improvements.

11 Third. That the cost and expense of the said work in making said improvements have not been distributed equally or in proportion to the benefit upon the houses and lots fronting upon said Vanderbilt avenue east, and upon all the houses and lots benefitted thereby and assessable therefor.

Wherefore, your petitioners pray that the said assessments be vacated and that the lien or liens created thereby, or by any subsequent proceedings, cease, so far as the said assessments affect the said lands owned, occupied and used by your petitioners as aforesaid, and that the collector of assessments and arrears, the clerk of arrears, the comptroller, and the deputy comptroller of the city of New York, be each directed to cancel and discharge said assessments and liens,

or apparent liens, upon the records in their respective offices, so far as the same affect the said lands of your petitioners.

Dated borough of Manhattan, N. Y. city, March 16, 1899.

THE NEW YORK AND HARLEM RAILROAD COMPANY,
By E. V. W. ROSSITER, *Treasurer.*
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By E. V. W. ROSSITER, *Treasurer.*
IRA A. PLACE, *Attorney for Petitioners.*

Office and P. O. address, Grand Central station, borough of Manhattan, N. Y. city, N. Y.

12 STATE OF NEW YORK, } ss:
County of New York, }

Edward V. W. Rossiter, being duly sworn, says: that he is the treasurer of The New York Central and Hudson River Railroad Company, and that he is the treasurer of The New York and Harlem Railroad Company, the petitioners above named; that the foregoing petition is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

E. V. W. ROSSITER.

Sworn to before me this 18th day of March, 1899.

H. B. DWYER,
Notary Public, N. Y. County, N. Y.

13 EXHIBIT A.

In common council.

Resolved, That Vanderbilt avenue east from the ward line to east 177th street be regulated and graded, the curbstones set, sidewalks flagged a space of four feet in width, and cross-walks laid at each intersecting or terminating street or avenue, where not already laid, under the direction of the commissioner of street improvements of the 23rd and 24th wards.

Adopted by the board of aldermen, October 23, 1894, three-fourths of all the members elected voting in favor thereof, having been first advertised as required by law.

Approved by the mayor October 31, 1894.

(Signed) MICHAEL F. BLAKE,
Clerk of the Common Council.

EXHIBIT B.

In common council.

Resolved, That the carriageway of Park avenue (Vanderbilt avenue east) from the 23rd ward line to 177th street be regu-

lated and paved with granite-block pavement and cross-walks laid at each intersecting or terminating street or avenue, where not already laid, under the direction of the commissioner of street improvements of the 23rd and 24th wards.

Adopted by the board of aldermen January 5, 1897, three-fourths of all the members elected voting in favor thereof, having been first advertised as required by law.

Approved by the mayor January 19, 1897.

(Signed) WILLIAM H. TENEYCK,
Clerk of the Common Council.

(Here follow maps marked pp. 13*a* to 13*g* incl.)

14 At a special term of the supreme court of the State of New York, held at part II thereof in the county court-house in the city of New York, on the 21st day of July, 1899.

Present: Hon. Charles H. Truax, justice.

In the Matter of the Petition of THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, as Lessees, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owners, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23d and 24th Wards to 177th Street, Confirmed February 17, 1899.

The motion for the vacation or reduction of the assessments above mentioned having come on for a hearing before the Hon. Charles H. Truax, one of the justices of this court, on the 13th of
15 April, 1899, and he having ordered, on the consent of the respective parties to this proceeding, that testimony be taken before a stenographer at the office of the corporation counsel, to be presented to the said justice for decision at a time and place to be determined upon, and the said testimony having been taken,

Now, upon reading and filing the petition and notice herein and the said testimony, after hearing Ira A. Place, attorney for the petitioners in favor of the said motion, and George L. Sterling, assistant corporation counsel for the city of New York opposed, and due deliberation having been had, it is, on motion of John Whalen, corporation counsel,

Ordered, that the motion or prayer of the petitioner herein be and the same hereby is denied, with ten dollars costs to the city of New York.

C. H. T., *J. S. C.*

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

16 *Notice of Appeal to Appellate Division.*

Supreme Court, New York County.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23rd and 24th Wards to 177th Street, Confirmed February 17, 1899.

SIRS: Take notice that the New York Central and Hudson River Railroad Company, as lessee, and the New York and Harlem Railroad Company, as owner, and each of them, hereby appeal to the appellate division of the supreme court, for the first department, from the order heretofore made and entered in the above-entitled proceeding in the office of the clerk of the county of New
17 York, on the 21st day of July, 1899, and for each and every part of said order.

Dated New York, August 7, 1899.

Yours, etc.,

IRA A. PLACE,

Attorney for The New York Central and Hudson River Railroad Company, as Lessee, and The New York and Harlem Railroad Company, as Owner, Appellants.

Office and P. O. address: Grand Central station, borough of Manhattan, N. Y. city, N. Y.

To John Whalen, Esq., corporation counsel, and William Sohmer, Esq., clerk of the county of New York.

18 Supreme Court, New York County.

In the Matter of the Petition of THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK & HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessment (1) for Regulating, etc., Vanderbilt Avenue East from Ward Line to 177th Street, Confirmed February 17, 1899; (2) Paving Park Avenue, Otherwise Vanderbilt Avenue East, from Division Line between 23d and 24th Wards to 177th Street, Confirmed February 17, 1899.

APRIL 27TH, 1899.

Appearances.

For the petitioners, Ira A. Place, Esq., R. L. Luce, Esq.
For the city, G. L. Sterling, Esq.

Testimony Taken Pursuant to the Order of Mr. Justice Truax, Made April 13, 1899.

Petitioners offer in evidence:

1. Deed, Gouverneur Morris to the New York & Harlem
19 Railroad Company, dated October 1, 1842, recorded in Westchester county clerk's office, in Liber 108 of Deeds, page 444, January 20, 1845, conveys the roadway from Millbrook north to Old Quarry road, including all the territory from the ward line north to 177th street, the strip of land being 66 feet in width.

This covers all the road-bed affected by the two assessments.

Received in evidence, and marked "Ex. 1."

2. Deed, Charles Bathgate and others to the New York & Harlem Railroad Company, dated January 2, 1854, recorded in Westchester county clerk's office, in Liber 334 of Deeds, page 310, July 19, 1856. Conveys parcel 25 feet x 250 feet, lying west of and adjoining the roadway conveyed by Exhibit 1, with the provision that it "shall be used solely and only for the purposes of a railroad and station-house to be thereon erected, and also that no ardent or intoxicating drinks shall be manufactured or bought or sold on the premises to be used as a beverage, and that no dwelling-house shall be erected on the said premises of less value than $500, and in case the said conditions are not faithfully performed and kept the estate in the said premises of the grantees, or their legal representatives or assigns, or any of them, shall cease and determine, and the said premises shall immediately revert to the grantors, their heirs or assigns." The said premises being also conveyed subject to all the conditions of fencing contained in the deed from Gouverneur Morris to the parties of the first part hereto.

Received in evidence and marked "Ex. 2."

3. Deed, Charles Bathgate and others to the New York & Harlem Railroad Company, dated October 13, 1856, recorded in the
20 Westchester county clerk's office in Liber 346 of Deeds, page 88, November 27, 1856.

Received in evidence and marked "Ex. 3."

4. Deed, Charles Bathgate and others to the New York & Harlem Railroad Company, dated July 27, 1868, recorded in Westchester county register's office, in Liber 686 of Deeds, page 128, August 27, 1868.

Received in evidence and marked "Ex. 4."

5. Deed, Charles Bathgate and others to the New York & Harlem Railroad Company, dated October 30, 1888, recorded in the office of the register of the city and county of New York, in Liber 2165 of Conveyances, pages 310, November 1, 1888.

Received in evidence and marked "Ex. 5."

Exhibits 2, 3, 4 and 5 convey all that part of block 2897 owned by the petitioners and lying westerly of the roadway conveyed by Exhibit No. 1.

6. Petitioners read in evidence charter of the New York & Harlem Railroad Company, chapter 263 of the Laws of 1831; also chapter 242 of the Laws of 1840, giving authority to the New York & Harlem Railroad Company to extend its railroad through the territory in question.

7. Certificate of the extension of the corporate existence of the New York & Harlem Railroad Company for the term of 500 years, from April 16, 1889, filed in the office of the secretary of state, Dec. 28, 1874.

Received in evidence and marked "Ex. 6."

8. Contract, New York & Harlem Railroad Company to the New York Central & Hudson River Railroad Company, dated April 1, 1873, expires April 1, 2274.

Received in evidence and marked "Ex. 7."

21 9. Map, entitled "Map of the village of Morrisania, situated about 1½ miles from the Harlem river, in the manor of Morrisania in the township of West Farms, in the county of Westchester and State of New York." Scale, 100 feet to an inch. Dated West Farms, August 10, 1848. Andrew Findlay, surveyor, etc.

Received in evidence and marked "Ex. 8."

10. Map, entitled "Map of Central Morrisania, being part of the Bathgate farm, situated in the manor of Morrisania, town of West Farms, county of Westchester, New York." Dated Westchester, February 1st, 1851. Andrew Findlay, surveyor.

Received in evidence and marked "Ex. 9."

11. Map, entitled "Map of the village of upper Morrisania, in the town of West Farms, in the county of Westchester, and State of New York, 1848." Dated West Farms, November 11, 1848. Andrew Findlay, surveyor.

Received in evidence and marked "Ex. 10."

12. Map of commissioner of street improvements of the 23d and 24th wards, sections 9 and 14, showing Park avenue or Vanderbilt avenue east throughout the location of the assessments made pursuant to chapter 548 of the Laws of 1890, and the acts amendatory thereof.

13. Read in evidence chapter 721, Laws of 1887. This is the act under which authority was given to the park department, then having jurisdiction over the streets and avenues in the 23d and 24th

ward-, to enter into a contract with the petitioners for the depression of the New York & Harlem railroad.

22 14. Agreement made in pursuance of chapter 721 of the Laws of 1887, between the department of public parks of the city of New York and the New York & Harlem Railroad Company, dated January 11, 1888, with a map annexed thereto.

Received in evidence and marked "Ex. 11."

ARTHUR HAVILAND, being first duly sworn, was examined by Mr. Place and testified as follows:

I live at 623 East 139th street, New York city, and am by profession a civil engineer in the employ of the petitioner, The New York Central & Hudson River Railroad Company. I have been in the employ of the petitioner eleven years. I have been a civil engineer twenty-eight years, and have been almost entirely engaged during that time in railroad work.

I have to do with railroad construction and am familiar with that line of work, and am familiar with the New York & Harlem railroad through its entire extent and present form of construction in the 23d and 24th wards, and was, in a general way as a passenger, not as an employee of the company, familiar with the form of construction of the New York & Harlem railroad in those wards prior to the work done under agreement of January 11, 1888, and I know the form of its construction prior to the improvement of 1888. The grade consisted of two tracks.

At the time that the deed from Gouverneur Morris to the petitioner, Exhibit No. 1, was given, this was substantially farming land, as I understood it, and Railroad avenue east or Park avenue east was not at that time shown on any map, so far as I find from the records. The first record or indication of that avenue which I found was on the maps in evidence marked Exhibits 8, 9 and 10. This avenue was originally called Railroad avenue, and then

23 Vanderbilt avenue east, and now Park avenue east. Throughout the northerly portion of this assessment there was also a Vanderbilt avenue, west, laid out parallel to and adjoining the railroad on the west.

Park avenue east, as it now exists, is shown on the map of the commissioner of street improvements of the 23d and 24th wards.

I am familiar with the provisions of the contract with the department of public parks, dated January 11, 1888, and of the work required to be done under that contract, and it was carried out entirely in accordance with that contract. I prepared the cross-sections of the railroad and of the work done under that contract, which are attached to the petition, and they are correct.

I also prepared other maps, which are attached as exhibits to the petition, being correct copies of the assessment maps.

I will describe, generally speaking, the form of construction of the Harlem railroad, or what was done under the contract of January 11, 1888, within the territory of assessment.

The two tracks of the Harlem railroad were east of the centre line of the railroad company's roadway. The westerly portion of

the company's roadway was excavated at various depths according to the grade given for the depression of the tracks upon the map attached to the agreement and forming part of the agreement with the park department, and in that excavation was constructed the foundation of a retaining wall along the westerly property line of the company's roadway. The retaining wall then continued upward to the surface of the ground as we then found it on the southerly portion of the area of assessment and to the established grade line of Railroad avenue west, as given upon the map before alluded to,
24 and upon the rest of the excavation were constructed two lines of railroad tracks, upon which the traffic of the railroad was then turned. The easterly portion of the roadway of the Harlem railroad was then excavated, and in such trench was constructed the foundation of a retaining wall which was ultimately carried upward to the established grade line of Railroad avenue east, and upon the rest of that excavation was laid two tracks forming the present four-track system of the Harlem railroad. These retaining walls are substantially perpendicular, and at 172d street these walls are 10 feet 6 inches high above the tops of the rails, and at 176th street, 10 feet 5 inches, and at 173d street and Tremont avenue 18 feet 3 inches.

The retaining wall on the easterly side of the railroad throughout the area of assessment is continuous, and it entirely cuts off access from Vanderbilt avenue east to and from the railroad property. On top of this easterly retaining wall there is a coping stone ten inches deep, and easterly of this coping and along the easterly line of the company's roadway is constructed a high picket fence of wood about eight feet high. The purposes of this wall and the picket fence are to prevent access from Vanderbilt avenue east.

This coping stone is above the grade line of the street. The bottom of the coping stone corresponds with the established grade line. The coping is entirely above the grade line of the street.

The lands of the petitioners which have been assessed in these proceedings are used for railroad purposes alone.

Q. Does either the regulating and grading, setting curbstones, flagging and laying cross-walks in Vanderbilt avenue east, from the ward line to 177th street, or the paving of Park avenue, otherwise Vanderbilt avenue east, from the division line between
25 the 23d and 24th wards to 177th street, in any manner benefit these lands?

This question is objected to by counsel for the city on the ground that it has been already determined by the board of assessors and the board of revision of assessments that the property is benefitted, and their decision cannot be attacked in this manner. That the question of whether the property is benefitted or not by the improvements is a matter within the jurisdiction of said assessors, and cannot be attacked collaterally.

A. It does not.

Q. Does the work specified in the last question, or any part of it, in any manner benefit the said lands of the petitioners assessed for railroad purposes?

Same objection.

A. It does not.

Q. It appears from the petition that the lands of the petitioner have been assessed in the sum of $4,687.82 for regulating and grading, setting curbstones, flagging and laying cross-walks in Vanderbilt avenue east, from the ward line to 177th street. Assuming that to be true, how much is that assessment increased over the fair value to this property of the improvement?

Objected to on the same ground, and, furthermore, that there is no testimony as to what is the fair value of the improvement. That the fair value of the improvement, as used in the statutes, means the fair cost to the city of New York of the actual work of construction, without regard to the fair value with reference to the property of the petitioner.

A. By $4,687.82.

Q. It appears from the petition that the property of the
26 petitioner has been assessed for paving Park avenue, otherwise Vanderbilt avenue east, from the division line between the 23d and 24th wards to 177th street, in the sum of $12,626.72. Assuming that to be true, how much is the assessment increased beyond the fair value to this property of the improvement?

Same objection as before.

A. $12,626.72.

Q. What is the fair value of each of these improvements to this property?

Same objection as before.

A. Nothing.

Q. Is the*ir* any value, fair or otherwise, to the property of the petitioner in these improvements, or either of them?

Same objection.

A. No, sir.

This roadway is now substantially entirely occupied by the four tracks of the railroad and these retaining walls and the foundations of the retaining walls. This roadway is used for no other purpose excepting the running of railroad trains.

Q. And cannot be used for any other purpose?

Objected to.

A. No, sir.

By Mr. STERLING:

I do not mean to intimate there was anything fraudulent in the actual construction of these works, in other words, I do not mean to claim that the cost of the work to the city was any more than a fair and reasonable cost for the construction of the work done, but simply that in my opinion the property of the railroad is not benefitted by these improvements. This property, as I understand, consists of

two parts, a strip of land about 66 feet wide on which are laid four railroad tracks and the foundation of the retaining wall, but
27 a part of this land is not used for those purposes; that is to say, a part of the land lies westerly of the railroad bed and has no railroad tracks upon it. There is nothing on this land; it is vacant and unimproved.

The two nearest stations of the railroad to these improvements are, one at Wendover avenue near its southerly end, and one at Tremont avenue at the extreme northerly end of the area of assessment of the improvement.

These streets upon which these improvements were constructed are part of the street system leading to and from these stations, and the avenue is contiguous to the railroad on the easterly side. These stations are passenger stations, and certain trains of the petitioner's stop for the receiving and discharging of passengers at certain times, and a person coming to or going from one of these stations would or could pass over these roads.

About 16 feet is the space in height above the top of the rail allowed for trains to pass. So that the grade at these points is 18 feet 3 inches above the top of the rail to the surface of the street at the stations.

By Mr. PLACE:

This land lying west of the roadway, which was referred to by counsel on the other side, and which I testified was not occupied by tracks, is also cut off from access to Railroad avenue east by this retaining wall. The retaining wall and the picket fence also cut off access to and from this land.

Take this station, Wendover avenue; the principal approach to that station is Wendover avenue from the east and west. And the other station at Tremont avenue; the main line of approach to that is east and west on Tremont avenue by trolley cars and otherwise, and the entrances are from those streets east and west. This
28 avenue in question, Vanderbilt avenue east or Park avenue east is a means of approach to the station, just the same as Third avenue or any other avenue that a person desiring to take a train might traverse; that is, this avenue in question affords no special facilities for getting to the station. There is no entrance to these stations from Vanderbilt avenue east. This retaining wall which was on the east side supports this avenue. The work which was done under the contract of January 11, 1888, was done wholly at the expense of the petitioners. September, 1842, is about the date of the commencement of the operation of the New York & Harlem railroad over this territory, open to the public to Williamsbridge.

Adjourned to Monday, May 1st, 1899.
Further adjourned to May 5th, 1899.

MAY 5TH, 1899.

Same Appearances.

Petitioner offered in evidence proceedings by the city to acquire title to the land within the lines of Vanderbilt avenue east, within the territory affected by the assessments mentioned in the petition.

Received in evidence and marked "Exhibit 12."

Also read in evidence section 878 of the consolidation act.

Offered in evidence book entitled Borough of the Bronx, No. 5665, assessment-list for regulating, grading, curbing, flagging and laying cross-walks in Vanderbilt avenue east from ward line to 177th street, together with a list of awards for damages caused by a
29 change of grade. Received May 10, 1898, advertised November 15, 1898, confirmed by the board of revision of assessments February 17, 1899, entered February 17, 1899.

Received in evidence and marked "Exhibit 13."

Also book entitled Borough of the Bronx, No. 5688, assessment-list for paving with granite-block pavement the carriageway of and laying cross-walks in Park avenue from the 23d ward line to 177th street. Received May 21, 1898, advertised December 20, 1898, confirmed by the board of revision of assessments February 17, 1899.

Received in evidence and marked "Exhibit 14."

Offered in evidence objections filed on behalf of the petitioner, with the board of assessors, in the matter of paving, &c., with granite-block pavement Park avenue from 23d ward line to 177th street, Vanderbilt avenue east (No. 5688).

Received in evidence and marked "Exhibit 15."

Also objections of the petitioner before the board of assessors in the matter of the assessment for regulating and grading, setting curbstones, flagging and laying cross-walks on Vanderbilt avenue east from ward line to 177th street, No. 5665.

Received in evidence and marked "Exhibit 16."

Also communication from board of assessors transmitting assessment-list for revision and correction, paving with granite-block pavement the carriageway of and laying cross-walks in Park avenue from the 23d ward line to 177th street, No. 5688, dated February 3, 1899.

Received in evidence and marked "Exhibit 17."

30 Also communication from the board of assessors transmitting to the board of revision of assessments assessment-list for revision and correction, regulating, grading, curbing, flagging and laying cross-walks in Vanderbilt avenue east from the ward line to 177th street, together with a list of awards for damages caused by a change of grade, No. 5665, dated January 24, 1899.

Received in evidence and marked "Exhibit 18."

Offered in evidence map entitled *In re* paving Vanderbilt avenue east, petition of the New York Central & Hudson River Railroad Company, and another, profile of the retaining wall along the easterly side of the New York & Harlem railroad, sustaining Vanderbilt avenue east, between 170th street and Tremont avenue, taken from the map annexed to the agreement of the department of public

parks, dated September 5, 1887, and showing the measured heights at intersecting streets.

Received in evidence and marked "Exhibit 19."

ARTHUR HAVILAND, recalled for petitioners:

By Mr. PLACE:

I made this map (Exhibit 19), and it is a correct copy. It represents the longitudinal or side view of this retaining wall, and shows also the grade of Vanderbilt avenue east, as now established, by heavy black line marked "Grade of Vanderbilt avenue, east." That is the retaining wall which cuts off all access to and from the railroad company's property and Vanderbilt avenue.

EDGAR VAN ETTEN, being duly sworn, testified:

By Mr. PLACE:

31 I reside in the city of New York, and am the general superintendent of the railroads owned and leased by the New York Central & Hudson River Railroad Company, including the New York & Harlem railroad. I know the Harlem railroad and that part of it extending from ward line between the 23d and 24th wards northerly to 177th street and am well acquainted with it and the territory affected by this proceeding.

As general superintendent of these railroads I have general charge of the property and railroads, and charge of the operation of the railroads. I have been in the railroad business 32 years. During that time I have occupied almost all positions, from brakeman up to general superintendent, including that of division superintendent of various railroads, among others the Erie, Lehigh Valley and Rome & Watertown. I am familiar with the manner of construction of that part of the Harlem railroad I have mentioned, and its depression below the surface of the surrounding land. I call attention to Petitioner's Exhibit 19, showing that solid stone retaining wall on the easterly side of the railroad within this territory. I am familiar with that wall; it looks familiar. I know that Vanderbilt avenue east, in question, is immediately east of and adjoining this retaining wall. There is no public access to or from the railroad property and Vanderbilt avenue east: it is cut off by this retaining wall. There is, I think, at that point, on top of this retaining wall a picket fence, which further shuts off access.

Q. State whether the regulating, grading, setting curbstones, flagging and laying cross-walks in Vanderbilt avenue east, from this ward line to 177th street benefits in any manner the railroad property assessed in this proceeding?

Same objection as to question in previous examination.

A. I can't see how there would be any benefit.

32 Q. State whether the paving of Vanderbilt avenue east, within these limits in any manner benefits that property?

Same objection.

A. I can't see how.

Q. This petition shows that for regulating, grading, etc., of this avenue the property of the railroad has been assessed in the sum of $4,687.82; that being the case, in what amount has the property been assessed in excess of the fair value of the improvement to this property?

Same objection.

A. The total amount, without any question.

Q. And it appears in evidence that the property of the railroad company has been assessed for paving this Vanderbilt avenue east, within the limits mentioned, in the sum of $12,626.72; that being the case, in what amount is the property of the railroad assessed in excess of the fair value of the improvement?

Same objection.

A. I don't consider that the railroad is benefited or improved in any way, shape or manner.

By Mr. STERLING:

The nearest bridge across the railroad track to this land is one at 172d street, that is the nearest within the territory, and persons and vehicles can go over the railroad track at this point from one side to the other. Further to the north the next bridge across is, I think, at 178th street.

When I speak of benefit to the railroad, I mean benefit to the railroad company or to the land of the railroad company or either or both.

Q. Suppose buildings or structures of any sort were built on this land of which we are speaking, would the regulating and paving of this Vanderbilt avenue, in your opinion, benefit the property at all?

33

A. It would benefit the houses that were along it, undoubtedly.

Q. So that if the railroad company would build buildings on this land they would be benefitted by these improvements? I am speaking of the land owned by the railroad company, both the roadway and the land west of the roadway on which there are no tracks?

A. I don't see how it would benefit the railroad property in any way on the west.

Q. Not so long as it is used for its present purposes, you mean?

A. I don't see how the paving of Vanderbilt avenue on the east side of the depression on which the railroad tracks run would be of any benefit to the small amount of property we own on the west side of those tracks.

Q. Suppose buildings were put upon it would it then benefit it?

A. No, sir, I don't see how.

Q. Suppose a steel structure should be built over the cut as it is now, 12 or 13 stories high, and rented out to tenants, do you think this street, Vanderbilt avenue, would be of any benefit to the property?

A. It might be, but I don't see how the railroad could be interested in that.

Q. There would be no engineering difficulty in building a structure ten stories high, if you pleased, over the track; the railroad could still run under it, couldn't it? It wouldn't interfere with the use of the railroad property?

A. Possibly that might be done.

Q. That might be a good office building, for instance?

A. It might be; yes, sir.

Q. There is nothing to prevent their doing it?

A. I assume not; there is no physical difficulty.

Q. There is no more difficulty in their building on that land than on any other land?

A. There is no physical difficulty, but there is a very strong improbability that they ever will.

34 By Mr. PLACE:

In the first place, I do not consider the erection of any sort of structure over this depressed cut as at all practical; it wouldn't be undertaken by the railroad company, it would be very objectionable.

I call attention to "Exhibit 19," and to the fact that at various points, as for instance at Bathgate avenue, the retaining wall and also the grade of Vanderbilt avenue east, is only about 11 feet 1 inch above the tops of the rails; that would not be sufficient so that buildings could be erected at that grade and trains operated under it; and at various other points, as at 176th street, the same condition would prevail; it would be necessary to have 15 feet, and that would require the re-regulating and grading of the avenue.

WILLIAM H. JASPER, being duly sworn, testified:

By Mr. PLACE:

I live in New York city, and am in the service of the city as secretary of the board of assessors, and have been secretary of the board during the time the present city charter has been in force, and about twenty-five years before, under the consolidation act. I have general charge of the office and of the proceedings before the board of assessors as secretary of the board.

Q. As a matter of fact, and in the ordinary routine of business, are you practically the executive officer of the board?

A. I am under the directions of the board. I see that all the proceedings which come before the assessors are correct in form and are properly brought before the board; that is part of my duty. They have regular meetings, and as occasion requires. The regular meetings of the board are once a week, and if there are matters of business which require its attention, oftener. The president
35 directs me to call a meeting. There are five assessors, and three of them constitute a quorum. Under the city charter the entire board acts for all boroughs.

Take first this proceeding for regulating and grading, setting

curbstones, flagging and laying cross-walks in Vanderbilt avenue east. The first paper which I would receive in that proceeding is the return from the department having charge of the execution of the work. In that case it would be from the commissioner of highways, certifying the sum total cost of the work. The next action taken is that the board of assessors transmit that to the comptroller, who furnishes the board with an interest certificate based upon payments made to the contractor from time to time during the execution of the work. The aggregate of these two certificates form the basis of the assessment. Both of those papers are included in the book No. 5665, Petitioners' Exhibit 13. The next thing done, after I get those figures, is that the board of assessors levy the cost of the work. The original certificate from the commissioner of highways is attached to a map showing the area of assessment which has been previously determined upon by the board of assessors.

Q. What information does the board of assessors have before them at the time when the area of assessment is determined?

A. They have a fixed rule governing works, and the departments are instructed to furnish areas on certain works, unless some unusual conditions exist that would warrant a change. The area of assessment in this particular case was fixed in the map which was received by the board of assessors from the commissioner of highways.

Q. And the commissioner of highways made that map or had it made under his direction?

36 A. The surveyor in charge of the work makes the map.

Q. And the area of assessment in this particular case extending along the sides of Vanderbilt avenue east and for half a block east and west, was fixed by that certificate and that map furnished by the commissioner of highways?

A. It was fixed by the board of assessors; it was shown on this map furnished by the commissioner of highways. That map is in this book (Exhibit 13).

Q. The assessors have adopted a general rule that the area of assessment in improvements of this kind shall be each side of the street improved and for one-half a block on either side?

A. Generally. The next step taken after that map is furnished is that the board of assessors proceeds to distribute the amount over the parcels in accordance with the benefit which they think each parcel receives.

Q. Take the parcels on the east side of Vanderbilt avenue east; they fix so much the front foot?

A. On the east side they bore a larger proportion than the front foot, because the return showed curbing and flagging sidewalks which didn't show on the other. As a matter of fact, in this case the map which was furnished by the commissioner of highways was accepted by the board of assessors as showing the correct area of assessment, but it was furnished under the direction of the board of assessors.

Q. The map which was furnished by the commissioner of highways in this case was accepted by them?

A. It was ordered by the board of assessors. The same course of procedure in general was followed in the assessment for paving with granite block, shown in book 5688, Petitioners' Exhibit 14.

A similar certificate received from the commissioner of highways, and from the comptroller, showing the sums expended and
37 the interest, and those two added together, and attached to the commissioner of highway's certificate, was the map showing the area of assessment which was adopted by the board, and all of those papers are in this book. After the receipt of those papers the total amounts as shown by the certificate of the commissioner of highways and the comptroller is distributed and assessed upon the lots in the assessment district, as shown by these books.

In the matter of paving, the map which was furnished by the commissioner of highways was accepted as showing the correct area of assessment, which is the same in both cases. Upon each of these assessments I was present when the objections of the petitioners were presented by Mr. Luce.

Q. Was it stated in substance by the board at the time that they took official notice of the physical situation, which is shown on the maps, copies of which are attached to the petition, and of the location and depression of the railroad?

A. I presented at the meetings all papers that were filed by the attorneys representing the railroad company.

It is conceded that on the filing of objections by petitioners, petitioners offered to introduce evidence showing that the physical condition of the road was the same as it is shown to be by the evidence offered in this proceeding, and that the board stated it was unnecessary to introduce such evidence at that time, as they knew such to be the physical situation of petitioners' land, and on that ground declined to receive such evidence.

I don't know whether, for the purpose of levying these particular assessments, any member of the board visited these grounds
38 personally or not; I have no knowledge that they did, and would not be apt to know it if they did.

By Mr. STERLING:

Q. Some evidence has been given as to the maps attached to these assessment-lists. I want to ask you whether these maps show the area of benefit as determined upon by the board of assessors?

A. They are in accordance with the directions of the board of assessors to the surveyor in charge of the work.

Q. They fixed the area of assessment as the assessors thought it should be?

Objected to.

Q. State the facts.

A. The board of assessors fixed the area of assessment as shown in this assessment-roll.

By Mr. PLACE:

Q. After they get this map?

A. No, sir, in advance; the fixing in advance is a general one, and the man who makes those maps is under the control of the board of assessors. The rule of the board of assessors under which the property on each side of the street improved one-half block either way is assessed, is a general one which they have adopted for property generally, and it is that general direction that the surveyor acts upon in making up each specific case, as these two in controversy here.

By Mr. STERLING:

Q. Did the board of assessors or the surveyor of the board of assessors determine this area of benefit as is shown here?

A. The board of assessors determined it.

39 EXHIBIT 1.

Deed conveying all of the road-bed affected by the two assessments. Offered by petitioners.

Gouverneur Morris to the New York & Harlem Railroad Company, dated October 1, 1842, recorded in Westchester county clerk's office, in Liber 108 of Deeds, page 444, Jan. 20, 1845. Conveys the roadway from Millbrook north to Old Quarry road, including all the territory from the ward line north to 177th street, a strip of land being 66 feet in width. This covers all of the road-bed affected by the two assessments. Deed not printed in full by consent of the parties.

EXHIBIT 2.

Deed conveying part of block 2897 owned by the petitioners and lying westerly of the roadway conveyed by Exhibit One. Offered by petitioners.

Deed Charles Bathgate and others to the New York & Harlem Railroad Company, dated January 2, 1854, recorded in the Westchester county clerk's office in Liber 334 of Deeds, page 310, July 19, 1856. Conveys parcel 25 feet x 250 feet lying west of and adjoining the roadway conveyed by Exhibit One, with the provision that it "shall be used solely and only for the purposes of a railroad and station-house to be thereon erected, and also that no ardent or intoxicating drinks shall be manufactured or bought or sold on the premises to be used as a beverage, and that no dwelling-house shall be erected on the said premises of less value than $500, and in case the said conditions are not faithfully performed and kept the estate and the said premises of the grantees or their legal representatives or assigns, or any of them, shall cease and determine, and the said premises shall immediately revert to the grantors, their heirs
40 or assigns; the said premises being also conveyed subject to all the conditions of fencing contained in the deed from Gouverneur Morris to the parties of the first part thereto." Deed not printed in full by consent of parties.

EXHIBIT 3.

Deed confirming Exhibit Two. Offered by petitioners.

Deed Charles Bathgate and others to the New York & Harlem Railroad Company, dated October 13, 1856, recorded in the Westchester county clerk's office in Liber 346 of Deeds, page 88, November 27, 1856. Conveys same premises as described in Exhibit Two. Deed not printed in full by consent of parties.

EXHIBIT 4.

Deed conveying property to the west of the roadway. Offered by petitioners.

Deed conveying part of block 2897, owned by the petitioners and lying westerly of the roadway conveyed by Exhibit One. Deed Charles Bathgate and others to the New York & Harlem Railroad Company, dated July 27, 1868, recorded in Westchester county register's office in Liber 686 of Deeds, page 128, August 27, 1868. Conveys a part of block 2897 now owned by the petitioners and lying westerly of the roadway conveyed by Exhibit One. Deed not printed in full by consent of parties.

EXHIBIT 5.

Deed conveying part of block 2897 owned by the petitioners and lying westerly of the roadway conveyed by Exhibit One. Offered by petitioners.

41 Deed Charles Bathgate and others to the New York & Harlem Railroad Company, dated October 30, 1888, recorded in the office of the register of the city and county of New York in Liber 2165 of Conveyances, page 310, on November 1st, 1888, and conveys a part of block 2897, owned by the petitioners and lying westerly of the roadway covered by Exhibit One. Deed not printed in full by consent of parties.

EXHIBIT 6.

Certificate of the extension of the corporate existence of the New York & Harlem Railroad Company for the term of 500 years from April 16, 1889, filed in the office of the secretary of state December 28, 1874. Offered by petitioners. This exhibit is not printed by consent of the parties.

EXHIBIT 7.

Contract of the New York & Harlem Railroad Company to the New York Central & Hudson River Railroad Company, dated April 1, 1873, expires April 1, 2274. Offered by petitioners. This exhibit is not printed by consent of the parties.

EXHIBIT 8.

Map of the village of Morrisania. Offered by petitioners.

Map entitled "Map of the village of Morrisania situated about

1½ miles from the Harlem river in the manor of Morrisania in the township of West Farms, in the county of Westchester in the State of New York. Scale 100 feet to the inch. Dated West Farms, August 10, 1848. Andrew Findlay, surveyor," etc. This map is not printed by consent of the parties.

42 EXHIBIT 9.

Map of central Morrisania. Offered by petitioners.

Map entitled "Map of Central Morrisania being part of the Bathgate farm, situated in the manor of Morrisania, town of West Farms, county of Westchester, New York, dated Westchester, February 1, 1851. Andrew Findlay, surveyor." This map is not printed by consent of the parties.

EXHIBIT 10.

Map of the village of Upper Morrisania. Offered by petitioners.

Map entitled "Map of the village of Upper Morrisania in the town of West Farms, in the county of Westchester and State of New York, 1848, dated West Farms, November 11, 1848. Andrew Findlay, surveyor." This map is not printed by consent of the parties.

EXHIBIT 11.

Agreement for the depression of the New York & Harlem railroad. Offered by petitioners.

Agreement made in pursuance of chapter 721 of the Laws of 1887 between the department of public parks of the city of New York and the New York & Harlem Railroad Company, dated January 11, 1888, with the map annexed thereto. This exhibit is not printed by consent of the parties.

EXHIBIT 12.

Proceedings of the city to acquire title to Vanderbilt avenue, east, within the territory affected by the assessments mentioned in the petition. Offered by petitioners.

43 Proceedings entitled in the matter of the application of the commissioners of the department of public parks for and on behalf of the mayor, aldermen, and commonalty of the city of New York relative to acquiring title to that certain street or avenue called Railroad avenue, east from the Harlem river to 161st street in the 23d ward of the city of New York. Report of commissioners confirmed August 11, 1887; from which order an appeal was taken to the general term and is reported in 47 Hun, page 302. This exhibit is not printed by consent of the parties.

EXHIBIT 13.

Assessment-list for regulating, grading, etc., Vanderbilt avenue, east, being the first list mentioned in the title to these proceedings. Offered by petitioners.

We, the subscribers, persons duly appointed, qualified and constituted as the board of assessors, and duly authorized and empowered to make a just and equitable assessment of the expense of conforming to a certain ordinance of the common council of the city of New York, passed on the 23d day of October, 1894, entitled "An ordinance that Vanderbilt avenue, east, from the ward line to East 176th street be regulated and graded, the curbstones set, the sidewalk flagged, a space four feet in width and cross-walks laid at each intersecting and terminating street or avenue where not already laid, under the direction of the commissioner of street improvements of the 23rd and 24th wards," and of executing and doing the work necessary to be done and required thereby among the owners or occupants of all the houses and lots intended to be benefitted thereby in proportion as nearly as may be to the advantage
44 which each shall be deemed to acquire, having first taken the oath required by law do hereby certify to the board of revision and correction of assessments that we have according to law ascertained the amount of such expense at the sum of twelve thousand two hundred and thirty-six dollars and twenty-seven cents as follows; that is to say,

Contract		$9,448.89
Awards for damage by reason of change of grade	$300.00	
Expenses connected therewith:		
Surveying	1,027.52	
Inspecting	518.00	
Interest	941.86	
		$2,487.38
Total		$12,236.27

and that we have according to law made a just and equitable assessment thereof as follows; that is to say,

In common council.

Resolved, That Vanderbilt avenue east, from the ward line to East 177th street, be regulated and graded, the curbstones set, the sidewalks flagged, a space four feet in width and cross-walks laid at each intersecting and terminating street or avenue where not already laid, under the direction of the commissioner of street improvements of the 23rd and 24th wards, adopted by the board of aldermen October 23, 1894, three-fourths of all the members elected

voting in favor thereof, having been first advertised, as required by law.

Approved by the mayor, October 31, 1894.

(Signed) MICHAEL F. BLAKE,
Clerk of the Common Council.

45 No. 4180.

City of New York, finance department.

COMPTROLLER'S OFFICE, *June* 11, 1896.

Pursuant to the provisions of section 868 of the New York city consolidation act of 1882, and section 946 of the Greater New York charter, the comptroller of the city of New York hereby certifies to the board of assessors of said city that the sum of nine hundred and forty-one and $\frac{86}{100}$ dollars ($941.86) is the amount of interest accruing at the rate of six per cent. per annum upon the several instalments advanced or payments made by the city on account of the work of regulating and grading, setting curbstones, flagging, and laying cross-walks in Vanderbilt avenue east, from the ward line to 177th street, performed under a contract by the commissioner of street improvements of the 23rd and 24th wards with George Clark, dated April 2, 1896, the said interest being calculated from the time of such payment or advance by the city to a day, sixty days after the date of this certificate.

BIRD S. COLER,
Comptroller.

Office of commissioner of street improvements, 23rd and 24th wards.

NEW YORK, —— —, 189-.

Regulating and grading, setting curbstones, flagging the sidewalks, and laying cross-walks in Vanderbilt avenue east from the ward line to 177th street.

I certify to the board of assessors that the contract for the
46 above work was awarded to George Clark April 2, 1896, at the prices annexed, and that the same has been returned as properly completed, and has been accepted by this department. The apportionment of the assessment may be made.

And I further certify in pursuance of section 5, chapter 556, Laws of 1880, that the total amount of expense incurred by the mayor, aldermen and commonalty is as follows:

Ordinance October 31, 1894.

Amount and kind of work.	Contract price.	Amount.
		Dollars. Cents.
3,021.7 cubic yards of earth excavation	.35	$1,057.60
2,893.6 cubic yards of filling	.01	28.94
7,992.7 lineal feet of new curbstone furnished and set	.55	4,395.99
15,458.9 square feet of new flagging furnished and laid	.17	2,628.01
1,124.8 square feet of new bridge stone furnished and laid	.50	562.40
443.4 cubic yards of dry rubble masonry	1.75	775.95
Surveyor's fees		1,027.52
Inspector's fees, 148 days, per day @	3.50	518.00
		10,994.41

Over-contract time charged to contractor April 6, 1898.

JAMES H. MALONEY,
Deputy Commissioner of Highways, Borough of the Bronx.
JAMES P. KEATING,
Commissioner of Highways.

I certify that the above amounts and prices annexed upon which the contract was awarded are correct.

C. C. CLARKE,
Chief Clerk, Secretary, Deputy of Highways, Borough of the Bronx.

47 *Assessment-list No.* 5665.

Board of assessors.

NEW YORK, *August* 13, 1898.

I have compared the maps attached to this assessment-list with the tax maps, also the map, block and ward numbers on said list, and find same correct.

JAMES F. EGAN, *Clerk.*

Assessment-list for regulating and grading, setting curbstones, flagging the sidewalks, and laying cross-walks in Vanderbilt avenue east from the ward line to 177th street.

48

Description of property.	Map No.	Street No.	Block No.	Ward No.	Owner.	Feet front.	Feet of curb and gutter.	Feet of curb and gutter reset.	Amount.
					Vanderbilt avenue east, westerly side, beginning at the ward line and running northerly.				
Ward line and southwest corner Vanderbilt avenue east and Wendover avenue	1	1219		90	Harlem Railroad Co.				
					549.62				
					66.				
					66.11				
	1½	1219		84	Harlem R. R.	681.73	1,058.90		
					403.80				
					66.				
Northwest corner Wendover avenue and southwest corner 173d St	2	1208		6	New York & Harlem R. R.	469.80			
					Vanderbilt Ave. E. 1,226.80				
					Wendover Ave 75.70				
					173d St 66.08				
Northwest corner 173d St. and southwest corner 175th St	3	1180½		1	N. Y. & Harlem R. R.	1,368.58	1,240.50		4,687.82
					Vanderbilt Ave. E. 962.74				
					173d St 33.04				
					175th St 66.				
Northwest corner 175th St. and southwest corner 177th St	4	1146½		1	N. Y. & Harlem R. R.	1,061.78	971.50		
					175th St 66.				
					Vanderbilt Ave. E. 780.04				
						846.04	763.70		
					Vanderbilt avenue east, easterly side, beginning at the southeast corner of Vanderbilt avenue east and 177th St. and running southerly.				
Southeast corner 177th St	5	1147		17	J. Paulsen	54.76	.29		42.94
	6	1147		14	Mrs. Francis	40.00	40.00		48.99
						4,760.82	4,103.60		4,779.75

49 Confirmed by the board of revision of assessments February 17, 1899.

EDGAR J. LEVEY,
Chief Clerk.

Charge collector of assessments and arrears, $12,236.27.
Department of finance, New York, February 25, 1899.

J. E. BARRETT,
Gen. Book-keeper.

NEW YORK, *Jan.* 24, 1899.

Edward McCue, John B. Meyenborg, Thomas A. Wilson, board of assessors:

Entered in the bureau for correction of assessments and arrears, February 17, 1899.

EDWARD GILON,
Collector of Assessments and Arrears.

EXHIBIT 14.

Assessment-list for paving with granite-block pavement the carriageway of and laying cross-walks in Park avenue, being the second-mentioned list in the title to these proceedings. Offered by petitioners.

No. 5688.

We, the subscribers, the persons duly appointed, qualified and constituted as the board of assessors, and duly authorized and empowered to make a just and equitable assessment of the expense of conforming to a certain ordinance of the common council of the city of New York, passed on the 5th day of January, 1897, entitled "An ordinance that the carriageway of Park avenue (Vanderbilt avenue east) from the 23rd ward line to 177th street be regulated and paved with granite-block pavement, and cross-walks laid at each intersecting and terminating street and avenue where not already
50 laid under the direction of the commissioners of street improvements of the 23rd and 24th wards, and of executing and doing the work necessary to be done and required thereby among the owners or occupants of all the houses and lots intended to be benefitted thereby in proportion as nearly as may be to the advantage which each shall be deemed to acquire, do hereby certify that we have according to law ascertained the amount of such expense at the sum of twenty-six thousand one hundred and sixty-seven dollars and fourteen cents, as follows, that is to say:

Contract		$23,626.97
Expenses connected therewith:		
Surveying	$947.57	
Inspecting	259.00	
Interest	1,333.60	
		2,540.17
		$26,167.14

and that we have according to law made a just and equitable assessment thereof as follows, that is to say:

In common council.

Resolved, That the carriageway of Park avenue (Vanderbilt avenue east) from the 23d ward line to 177th street be regulated and paved with granite-block pavement, and cross-walks laid at each intersecting or terminating street and avenue where not already laid under the direction of the commsssioner of street improvements of the 23d and 24th wards, adopted by the board of aldermen January 5, 1897, three-fourths of all the members elected voting in favor thereof, having been first authorized as required by law. Approved by the mayor January 19, 1897.

(Signed) WILLIAM H. TEN EYCK,
Clerk of the Common Council.

51 4203.

The city of New York, finance department.

COMPTROLLER'S OFFICE, *June* 11, 1898.

Pursuant to the provisions of section 868 of the New York city consolidation act of 1882, and section 946 of the Greater New York charter, the comptroller of the city of New York hereby certifies to the board of assessors of said city that the sum of thirteen hundred and thirty-three $\frac{60}{100}$ dollars ($1,333.60) is the amount of interest accruing at the rate of six per cent. per annum upon the several instalments advanced or payments made by the city on account of the work of regulating and paving, laying cross-walks in Park avenue from the 23d ward line to 177th street, performed under a contract by the commissioner of street improvements of the 23d and 24th wards with Charles Mitchell, dated April 8, 1897, the said interest being calculated from the time of such payment or advance by the city to a day sixty (60) days after the date of this certificate.

BIRD S. COLER,
Comptroller.

Office of commissioner of street improvements, 23d and 24th wards.

NEW YORK, *May* 21, 1898.

Regulating and paving with granite-block pavement the carriageway of and laying cross-walks in Park avenue from the 23d ward line to 177th street.

I certify to the board of assessors that the contract for the above work was awarded to Charles Mitchell April 8, 1897, at the prices annexed, and that the same has been returned as properly completed and has been accepted by this department. The apportion-
52 ment of the assessment may be made. And I further certify, in pursuance of section 5, chapter 556, Laws of 1880, that the total amount of expenses incurred by the mayor, aldermen and commonalty is as follows:

Ordinance, January 19, 1897.

Amount and kind of work.	Contract price.	Amount.
		Dollars. Cents.
15,756.06 square yards new granite-block pavement. . .	1.48	$23,319.77
768 square feet new bridge stone	.40	307.20
Surveyor's fees		947.57
Inspector's fees, 74 days	3.50	259.00
		24,833.54

Over-contract time charged to contractor.
May 17th, 1898.

JAMES P. KEATING,
Commissioner of Highways.
JAMES H. MALONEY,
Deputy Commissioner of Highways, Borough of the Bronx.

I certify that the above amounts and prices annexed, upon which the contract was awarded, are correct.

C. C. CLARKE,
Chief Clerk, Secretary, Deputy of Highways, Borough of the Bronx.

Assessment No. 5688.

Board of assessors.

NEW YORK, *August* 15, 1898.

I have compared the maps attached to this assessment-list with the tax maps, also the map, block and ward numbers on the said list and find the same correct.

JOHN L. KIERNAN, *Clerk.*

February 2, '99.

Assessment-list for regulating and paving with granite-block pavement the carriageway of and laying cross-walks in Park avenue from the 23rd ward line to 177th street.

53

Description of property.	Map No.	Block No.	Ward No.	Owner.	Front lin. feet.	Amount. Dolls.	Cts.
				Park avenue, westerly side, beginning at the ward line and running northerly.			
Ward line to Wendover Ave.	1	2895	45	N. Y. & Harlem R. R. Co.			
		*1219	*90	403.80 Park Ave. E..... 66.			
		2895	*84	66. St. Paul..... 549.62			
	1½	*1219	85	66. 171st St..... 66.11			
Wendover Ave. to 173d St.	2	2897	*84		681.73		
		*1208	56	Do.	535.80		
				Wendover Ave... 75.70			
				Park Ave. E..... 1,286.80			
				173d St..... 66.08			
					1,368.58		
173d St. to 175th St.	3	2898	60	Do.			
				174th St..... 66.			
	8	*1180½		173d St..... 33.04		12,542	63
		2899	70	Park Ave. E..... 912.74			
				175th..... 33.			
175th St. to 177th St.	4	2900	90		1,044.78		
		*1146½	107	Do.			
				175th St..... 33.			
				Park Ave. E..... 730.05			
				177th St..... 33.39			
				176th St..... 66.			
					862.44		
				Park avenue, easterly side, beginning at the southeast corner of 177th street and running southerly.			
Corner of 177th St. and Park Ave. east.	5	2909	12	J. Paulsen.			
		*1147	*17	177th St..... 60.70			
				Park Ave. E..... 54.76			
					115.46	138	26
	6	"	10	Mrs. Francis.....	40.00	136	68
			*14				
	7	"	5	H. Tarbox.....	108.00	368	99
			*7				
Northeast corner 176th St. and Park Ave. east.	8	"	1	Mrs. Lent.			
			*1	Park Ave. E..... 108.00			
				176th St..... 100.00			
					208.00	398	99
Southeast corner 176th St. and Park Ave. east.	9	2908	15	Mrs. S. M. Purdy.			
		*1152	*21	176th St..... 98.00			
				Park Ave. E..... 108.00			
					206.00	397	79
	10	"	8	J. Langbein.....	158.00	539	82
			*11				
	11	"	5	Mary A. Payne.....	58.00	198	16
			*7				
					5,304.14	$14,720	71

[* Figures erased in copy.]

54 Charged collector of assessments and arrears $26,167.14.
Department of finance, New York, February 25, 1899.

J. S. BARRETT,
Gen. Book-keeper.

NEW YORK, *January* 31, 1899.

Edward McCue, John Meyenborg, Thomas H. Wilson, board of assessors:

Entered in the bureau for collection of assessments and arrears February 17, 1899.

EDWARD GILON,
Collector of Assessments & Arrears.

February 17, 1899.

Confirmed by the board of revision of assessments, Feb. 17, 1899.

EDGAR J. LEVEY,
Chief Clerk.

55 EXHIBIT 15.

Objection of Petitioners to the First Assessment Proceeding.

Before the board of assessors.

In the Matter of the Assessment for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks on Vanderbilt Avenue East from Ward Line to 177th Street. No. 5665.

To the board of assessors.

GENTLEMEN: The New York & Harlem Railroad Company, as owner, and the New York Central & Hudson River Railroad Company, as lessee, of the following property: block No. 1219, lot No. 90; block No. 1219, lot No. 84; block No. 1208; lot No. 6; block No. 1180½, lot No. 1; block No. 1146½, lot No. 1; upon which an assessment has been laid of $4,687.82 for the above-entitled improvement, object and protest against the said assessment upon the following grounds: That it is unfair, unequal, inequitable and unjust, and is assessed more than the surrounding property.

The property assessed extends along the entire western line of the improvement for 4,105 feet, and is 66 feet wide. Upon the opposite or westerly side of the property assessed, which is held by the New York & Harlem Railroad Company, as owner, and is in the
56 possession of and is used and occupied by the New York Central & Hudson River Railroad Company, as lessee, for the purpose of its incorporation, is Vanderbilt avenue west, a public street and thoroughfare, and the property, therefore, is liable to an assessment for improvement for Vanderbilt avenue west. It is, therefore, not to be considered as full-lot property, although the assessment against it is made upon that basis.

By virtue of the above premises it is respectfully submitted that the foregoing assessment should be materially reduced.

Offered by petitioners.

NEW YORK & HARLEM RAILROAD COMPANY,
By E. V. W. ROSSITER, *Treasurer.*
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
By E. V. W. ROSSITER, *Treasurer.*

STATE OF NEW YORK, }
County of New York, } ss:

E. V. W. Rossiter, being duly sworn, says: That he it treasurer of the New York & Harlem Railroad Company and the New York Central & Hudson River Railroad Company, and that the foregoing objections and the facts therein stated are true, as he verily believes.

——.

Sworn to before me this 15th day of December, 1898.

H. B. DWYER,
Notary Public, N. Y. Co.

Offered by petitioners.

57 EXHIBIT 16.

Objection of Petitioners to the Second Assessment Proceeding.

Before the board of assessors.

In the Matter of Paving, etc., with Granite Block Pavement, Park Avenue from the 23rd Ward Line to 177th Street (Vanderbilt Avenue East). No. 5688.

To the board of assessors.

GENTLEMEN: The New York & Harlem Railroad Company, as owner, and the New York Central & Hudson River Railroad Company, as lessee, of the following property: block No. 1219, lot- Nos. 90 and 84; block No. 1208, lot No. 6; block No. 1146½, lot No. 1; and block No. 1219, lot No. 1, upon which an assessment has been made for the above-entitled improvement, object and protest against the said assessment upon the same grounds set forth in the objections filed by the same parties herein in proceedings Nos. 5655 and 5681 by virtue of the premises set forth in the objections filed in the aforesaid proceedings; and it is respectfully submitted
58 that the foregoing assessments should be entirely vacated or materially reduced.

IRA A. PLACE,
Attorney for the New York & Harlem Railroad Company and the New York Central & Hudson River Railroad Company.

Office and P. O. address, Grand Central station, New York city.

ROBERT L. LUCE, *Of Counsel.*

Offered by petitioners.

EXHIBIT 17.

Communication from the Board of Assessors Transmitting to the Board of Revision and Assessments the Second Assessment-list.

Office board of assessors.

NEW YORK, *Feb.* 3, 1899.

To the board of revision of assessments.

GENTLEMEN: The following assessment-list, to wit, borough of the Bronx,

Paving with granite block pavement the carriageway of and laying cross-walks in Park avenue from the 23rd ward line to 177th street, No. 5688

also copy of same, is herewith presented by order of the board of assessors, the same having been advertised for objections the 59 time prescribed by law, and the accompanying objections of the following-named owners:

New York & Harlem Railroad Company,
by Ira A. Place, attorney,

being still made to said assessment.

Yours respectfully, WM. H. JASPER, *Secretary.*

Offered by petitioners.

EXHIBIT 18.

Communication from the Board of Assessors Transmitting to the Board of Revision and Assessments the First Assessment-list.

Office board of assessors.

NEW YORK, *Jan.* 24, 1899.

To the board of revision of assessments.

GENTLEMEN: The following assessment-lists, to wit, borough of the Bronx,

Regulating, grading, curbing, flagging and laying cross-walks in Vanderbilt avenue east from the ward line to 177th street, together with a list of awards for damages caused by a change of grade, No. 5665

also copy of same are herewith presented by order of the board of assessors, the same having been advertised for objections the 60 time prescribed by law, and the accompanying objections of the following-named property-owners.

New York & Harlem Railroad Company,
by Robert L. Luce, attorney;
Jacob F. Paulsen, and authorized by Gumbleton & Hottenroth, attorneys,

being still made to said assessments.

Yours respectfully, WILLIAM H. JASPER, *Secretary.*

Offered by petitioners.

EXHIBIT 19.

Profile map of retaining wall of the easterly side of the New York & Harlem railroad sustaining Vanderbilt avenue east along the entire line of these assessments. Map entitled *In re* paving Vanderbilt avenue, east, petition of the New York Central & Hudson River Railroad Company, and another profile of the retaining wall along the easterly side of the New York & Harlem railroad sustaining Vanderbilt avenue east, between 170th street and Tremont avenue, taken from the map annexed to the agreement of the department of parks, dated September 5, 1887, and showing the measured heights at intersecting streets. Offered by petitioners.

(Here follows map marked p. 60*a*.)

61 CITY AND COUNTY OF NEW YORK, *ss*:

Robert L. Luce, being duly sworn, deposes and says: That he is an attorney and counsellor at law, and is connected with the law department of The New York Central and Hudson River Railroad Company, one of the petitioners in the foregoing proceeding, and that he has charge of the said proceeding; that no opinion was written upon the decision of the application of the said petitioners herein.

ROBERT L. LUCE.

Subscribed and sworn to before me this 16th day of October, 1899.

STANSBURY HAGAR,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

62 Pursuant to section 3301 of the Code of Civil Procedure we hereby stipulate that the foregoing are true copies of the notice of appeal, the order appealed from and the papers upon which the court below acted in making said order on appeal in the office of the clerk of the county of New York.

Dated New York, Oct. 25, 1899.

IRA A. PLACE,
Attorney for Petitioners and Appellants.
JOHN WHALEN,
Counsel to the Corporation of the City of New York, Respondent.

It is hereby stipulated that any or all of the exhibits not hereinbefore printed in full in these printed papers on appeal may be read by either party upon any argument of the said appeal.

Dated New York, October 20th, 1899.

IRA A. PLACE,
Attorney for Petitioners and Appellants.
JOHN WHALEN,
Counsel to the Corporation of the City of New York, Respondent.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

63 At a term of the appellate division of the supreme court, in and for the first department, held at the court-house thereof, in the county of New York, on the 9th day of March, 1900.

Present: Hon. Charles H. Van Brunt, P. J.; Hon. George C. Barrett, Hon. William Rumsey, Hon. Chester B. McLaughlin, JJ.

Order of Appellate Division Affirming Order of Special Term.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from the Ward Line to 177th Street, Confirmed February 17th, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East from the Division Line between the Twenty-third and Twenty-fourth Wards to 177th Street, Confirmed February 17th, 1899.

64 The above-named petitioners, The New York Central and Hudson River Railroad Company, as lessee, and The New York and Harlem Railroad Company, as owner, having appealed to the appellate division of the supreme court in and for the first department, from the order herein entered and filed in the office of the clerk of the county of New York, on the 21st day of July, 1899, denying the petitioners' motion or prayer for the vacation or reduction of the assessments above mentioned, and the said appeal having come duly on to be heard,

Now, after hearing Ira A. Place, Esq., of counsel for petitioners, in support of said appeal, and George L. Sterling, Esq., assistant corporation counsel, in opposition thereto, upon motion of John Whalen, corporation counsel, it is unanimously

Ordered, that the said order, so appealed from as aforesaid, be and the same hereby is affirmed, with ten dollars costs and disbursements, to the city of New York.

65 Supreme Court, Appellate Division, First Department, February, 1900.

Chas. H. Van Brunt, P. J., George C. Barrett, William Rumsey, Chester B. McLaughlin, JJ.

Opinion, McLaughlin, J.

In the Matter of the Petition of THE N. Y. C. & H. R. R. R. Co. and THE N. Y. & H. R. R. Co. No. 1987.

MARCH 9, 1900.

Appeal from an order denying an application to vacate an assessment for local improvements.

Mr. Ira A. Place, for the appellants.
Mr. George L. Sterling, for the respondents.

MCLAUGHLIN, *J.:*

The New York Central & Hudson River Railroad Company and The New York & Harlem Railroad Company, upon a verified petition, applied to the special term of this court to have vacated two assessments upon their property for local improvements; one amounting to $4,687.82, for regulating and grading, and the other, amounting to $12,627.72, for paving Vanderbilt avenue, east, in the city of New York. These improvements were made under a reso-
66 lution of the common council, and the entire cost of the same was to be assessed "among the owners or occupants of all the houses and lots intended to be benefitted thereby, in proportion, as nearly as may be, to the advantages which each shall be deemed to acquire." (Chap. 410, Laws of 1882, sec. 878.)

The petitioners contended, in the court below, as they did upon this appeal, that their property upon which the assessments were levied is held and used solely for railroad purposes; that there are no buildings or improvements upon it, except railroad structures; and that it is not, and will not be benefitted by the improvements, and therefore, the assessments are illegal. The conclusion at which we have arrived, renders it unnecessary to determine whether the petitioners' property is, or will be, in fact benefitted by the improvements, for if that fact be conceded, it does not in and of itself entitle them to have the assessments vacated.

It is conceded by both parties that the application to have the assessments vacated is governed by certain provisions of the Greater New York charter. (Chapter 378, Laws of 1897.) The appellants contend that sec. 959 of the charter is applicable, and that under its provisions the petitioners have the right to apply to have the assessment- vacated, and that the court, if the assessments are illegal, has power to vacate and set them aside. This section, or so much of it as is applicable to the question, reads as follows: "If in the proceeding relative to any assessment or assessments for local improvements, or in the proceedings to collect the same, any fraud or sub-

stantial error shall be alleged to have been committed, the party aggrieved thereby may apply to a justice of the supreme court in special term, or in vacation, who shall thereupon, upon due notice to the corporation counsel, proceed forthwith to hear the proofs and
67 allegation- of the parties. If, upon such hearing, it shall appear that the alleged fraud or substantial error, other than such errors as are specified in the next section, has been committed as provided in this title, the said assessment shall be vacated or modified and the lien created thereby, or by any subsequent proceedings shall cease. If upon such hearing, it shall appear that by reason of any alleged irregularity the expense of any local improvements has been unlawfully increased, the judge may order that such assessment upon the lands of said aggrieved party be modified by deducting therefrom such sum as is in the same proportion to such assessment as is the whole of such unlawful increase to the whole amount of the expense of such local improvement."

It is not claimed that the assessments should be set aside on the ground of fraud, but it is insisted that "substantial error" was committed; that, the improvements being of no benefit whatever to the petitioners' property, there was no basis for the assessments, and no authority under the statute to impose the same. On the other hand, the respondent contends that, under sec. 962 of the charter, the court has no power to vacate an assessment for local improvements. Sec. 962 reads as follows:—"No court shall vacate or reduce any assessment in fact or apparent, whether void or voidable, on any property for any local improvement otherwise than to reduce any such assessment to the extent that the same may be shown by parties complaining thereof to have been in fact increased in dollars and cents, by reason of fraud or substantial error; and in no event shall that proportion of any such assessment which is equivalent to the fair value or fair cost of any local improvement, with interest at the rate of three per centum per annum from the date of con-
68 firmation to the final order of reduction, and seven per centum thereafter, be disturbed for any cause. The provisions of this section shall apply to actions to recover money paid for assessments and the amount recovered shall be limited to the excess over the fair value or fair cost of the improvement." These two sections of the charter are somewhat inconsistent, and in some respects, repugnant to each other; but, in order to ascertain the legislative intent, they must be read and construed together, and when this is done, it seems to us clear that the purpose of the two sections, and the object sought to be accomplished by them, was to deprive the court of the power "in any event" to vacate an assessment for local improvements. To hold otherwise, the plain meaning of sec. 962 must be disregarded, and the following words eliminated therefrom: "No court shall vacate * * * any assessment in fact or apparent, whether void or voidable, on any property for any local improvement"

The court is given the power to reduce an assessment, but deprived of the right to vacate it. It may correct an error, but it cannot entirely wipe out the assessment itself. In so far, therefore, as the two

sections are repugnant to, or inconsistent with, each other, effect must be given to the latter, in preference to the former. Applying a well-recognized rule, applicable to the construction of statutes, that "if the latter part of a statute be repugnant to the former part thereof, it shall stand and so far as it is repugnant, be a repeal of *the former part, because it was last agreed to* by the makers of the statute." (Harrington *vs.* Trustees of Rochester, 10 Wendell, 547, quoting Bacon's Abridgment, Sedgwick on Statutory Limitations, page 105.) This rule, it is true, is to be resorted to only in extreme cases and applied, when resorted to, with great caution. But
69 the language of section 962 is so clear and specific that what the legislature intended to accomplish cannot be seriously questioned, and to give effect to that intent this rule must be applied, so far as is necessary, to effectively carry out the intent. This section is substantially like—in fact, so far as this question is concerned, is the same as section 903 of the consolidation act prior to the amendment of 1895 (chap. 613). Section 903 of the consolidation act was a re-enactment of section 12 of chap. 550 of the Laws of 1880, which was construed by the court of appeals in the matter of Smith, 99 N. Y., 424. The matter of Smith was an application to have vacated an assessment for local improvements, and it was there conceded that the assessment in question was in fact illegal, but the court held that it had no power to vacate. The language of Judge Finch, in delivering the opinion of the court in that case, is quite applicable to the question here presented. He said: "The petitioner *in* pursuing his remedy under the provisions of the act of 1858, chap. 338, and its amendments. That is a special remedy. * * * It was a remedy which the legislature might give or refuse, and having given, might modify or limit at its pleasure. Originally very broad and covering a large class of cases, it was, at a later period, very much narrowed and restricted (Laws of 1880, chap. 550, paragraph 12). That restriction took the form of a positive prohibition. It forbade any interference with assessments through the operation of the special remedy as to all such confirmed after June 9th, 1880, for any improvements completed after the date of the enactment, and whether such assessments were 'in fact or apparent void or voidable,' except that they might be reduced to the fair value of the actual improvement made. * * * The amendment does not validate an
70 illegal assessment, but it does narrow a special remedy so that it no longer covers that particular wrong, and remits the injured party to the ordinary remedies of the citizen generally, except that a bill in equity to vacate the assessment or to remove it as a cloud on title is forbidden (Laws of 1882, chap. 410, paragraph 897). The property-owner may still challenge the validity of the assessment, whenever his property is seized under it, or it is made the foundation of proceedings against him. It is again urged that the amendment was intended to reach, and must be construed to cover, only cases of irregularity or fraud in which an original authority to make the assessment existed, and not to those in which there was no such authority. The language of the section does not permit such a construction. When it describes the assessment to which it

applies, not only as existing 'in fact' but as 'merely apparent,' and not only as 'voidable' but as 'void,' it carefully shuts the door upon any such limited construction, and lest the meaning should even then be doubtful, it adds that 'in no event shall that proportion of any such assessment which is equivalent to the fair value of any actual local improvement, with interest from the date of confirmation, be disturbed for any cause.' * * * The courts below were, therefore, right in determining that the special remedy in vogue by the petitioner, had no application to the case which he presented." (See also Matter of Brainerd, 51 Hun, 380; aff'd 117 N. Y., 623; Matter of Feust, 121 N. Y., 299; Matter of Cullen, 53 Hun, 534.)

We are of the opinion that the application was properly denied, and that the order appealed from is right and must be affirmed, with $10 costs and disbursements.

All concur.

71 *Notice of Appeal to the Court of Appeals.*

Supreme Court, New York County.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Crosswalks in Vanderbilt Avenue East from the Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the Twenty-third and Twenty-fourth Wards to 177th Street, Confirmed February 17, 1899.

SIRS: Take notice that the above-named The New York Central and Hudson River Railroad Company and The New York and Harlem Railroad Company, and each of them, hereby appeal to the court of appeals from the order of the appellate division, first judicial department, entered and filed in the office of the clerk of the appellate division of the supreme court for the first judicial
72 department on the 19th day of March, 1900, and a certified copy of which order was filed in the office of the clerk of the county of New York on the 20th day of March, 1900, ordering that the order herein entered and filed in the office of the clerk of the county of New York on the 21st day of July, 1899, denying the motion or prayer of the petitioners, The New York Central and Hudson River Railroad Company and The New York and Harlem Railroad Company, for the vacation or reduction of the assessments above mentioned, be affirmed with ten dollars costs and disbursements to the city of New York, and from each and every part of said order.

Dated borough of Manhattan, New York city, March 27, 1900.

Yours, etc.,

IRA A. PLACE,

Attorney for The New York Central and Hudson River Railroad Company and The New York and Harlem Railroad Company, Petitioners and Appellants, Grand Central Station, Borough of Manhattan, N. Y. City, N. Y.

To William Sohmer, Esq., county clerk, New York county, county court-house, borough of Manhattan, N. Y. city, N. Y.; and John Whalen, Esq., corporation counsel, No. 2 Tryon row, borough of Manhattan, N. Y. city, N. Y.

73 Pursuant to section 3301 of the Code of Civil Procedure, we hereby stipulate that the foregoing are true copies of the notice of appeal, the order appealed from and the papers upon which the court below acted in making said order, on file in the office of the clerk of the county of New York, and certification thereof, as required by section 1353 of the Code of Civil Procedure, is hereby waived.

Dated New York, May 14, 1900.

IRA A. PLACE,
Attorney for the Petitioners and Appellants.
JOHN WHALEN,
Counsel to The Corporation of the City of New York, Respondent.

It is hereby stipulated that any or all of the exhibits not hereinbefore printed in full in these printed papers on appeal may be read by either party upon any argument of the said appeal.

Dated New York, May 14, 1900.

IRA A. PLACE,
Attorney for the Petitioners and Appellants.
JOHN WHALEN,
Counsel to The Corporation of the City of New York, Respondent.

74 At a special term, part II, of the supreme court, in and for the county of New York, held at the county court-house in said county on the 29th day of June, 1900.

Present: Hon. Frederick Smyth, justice.

In the Matter of the Petition of THE NEW YORK CENTRAL & HUDSON R. R. R. COMPANY, as Lessee; THE NEW YORK & HARLEM R. R. COMPANY, as Owner, Petitioners, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from the Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23rd and 24th Wards to 177th Street, Confirmed February 17, 1899.

The above-named petitioners The New York Central & Hudson R. R. R. Co. and The New York & Harlem R. R. Co., and each of them having appealed to the court of appeals from the order of the appellate division of the first judicial department, entered and filed in the office of the clerk of the appellate division of the supreme court for the first judicial department, on the 19th day of March, 1900, and a certified copy of which order was filed in the office of the clerk of the county of New York on the 20th day of March,

1900, ordering that the order herein entered and filed in the
75 office of the clerk of the county of New York, on the 21st day of July, 1899, denying the motion or prayer of the petitioners The New York Central & Hudson R. R. R. Co., and The New York & Harlem R. R. Co., for the vacation or reduction of the assessments above mentioned be affirmed with $10 costs and disbursements to the city of New York, and the said appeal having been duly argued before the court of appeals, and after due deliberation the court of appeals having ordered and adjudged that the said order so appealed from as aforesaid be and the same hereby is affirmed with costs, and after further ordering and adjudging that the proceeding therein be remitted to the supreme court there to be proceeded upon according to law, now on reading and filing the said remittitur and on motion of John Whalen, corporation counsel, it is,

Ordered that the said order and judgment of the court of appeals be and the same are hereby made the order and judgment of this court.

Enter,

F. SMYTH, *J. S. C.*

76 [Endorsed:] New York supreme court county of New York. The N. Y. Central & Hudson R. R. R. Co., and another, to vacate assessments, etc. Order on remittitur and notice of entry. John Whalen, corporation counsel, # 2 Tyron row, borough of Manhattan, New York city.

77 *Judgment.*

Supreme Court, County of New York.

In the Matter of the Petition of THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK & HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) *and* Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from the Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23rd and 24th Wards to 177th Street, Confirmed February 17, 1899.

The above-named petitioners The New York Central & Hudson River Railroad Company, as lessee, and The New York & Harlem Railroad Company, as owner, having appealed to the appellate division of the supreme court, in and for the first department, from the order herein entered and filed in the office of the clerk of the county of New York on the 21st day of July, 1899, denying the petitioners' motion or prayer for the vacation or reduction of the assessment above mentioned, and the said appeal having been duly argued at said appellate division and an order having been duly entered in the office of the clerk of the said appellate division on the 19th day of March, 1900, affirming the order so appealed from as aforesaid with $10 costs and disbursements to the city of

New York, and the cost of the city of New York having been duly taxed at the sum of $34.85, now upon motion of John Whalen, corporation counsel, it is

Adjudged that the said order so appealed from as aforesaid
78 be and the same hereby is affirmed, and it is further

Adjudged that the City of New York recover of the above-named petitioners The New York Central & Hudson River Railroad Company as lessee, and The New York & Harlem Railroad Company as owner, the sum of thirty-four and $\frac{85}{100}$ ($34.85) dollars the amount of its costs as taxed, and that it have execution therefor.

Dated New York, October 18 1900.

WM. SOHMER, *Clerk.*

79 [Endorsed:] New York supreme court county of New York. *In re* N. Y. Central & H. R. R. Co. as lesses, and the N. Y. & Harlem R. Co. as owner, to vacate assessments, etc. for regulating etc. Vanderbilt avenue, east, etc., and for paving Park avenue, etc. Copy of judgment and notice of entry. John Whalen, corporation counsel, # 2, Tyron row, borough of Manhattan, New York city.

80 *Judgment.*

Supreme Court, County of New York.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Lessees, and THE NEW YORK AND HARLEM RAILROAD COMPANY, Owners, Petitioners, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from the Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Dividing Line between the 23rd and 24th Wards to 177th Street, Confirmed February 17, 1899.

The above-named petitioners, The New York Central and Hudson River Railroad Company, as lessees, and The New York and Harlem Railroad Company, as owners, and each of them have appealed to the court of appeals from the order of the appellate division of the first judicial department, entered and filed in the office of the clerk of the appellate division of the first judicial department on the 19th day of March, 1900, and a certified copy of which was filed in the office of the clerk of the county of New York on the 20th day of March, 1900, ordering that the order herein, entered and filed in the office of the clerk of the county of New York on the 21st day of July, 1899, denying the motion or hearing of the petitioners, The New York Central and Hudson River Railroad Company, as lessees, and The New York and Harlem Railroad Company, as owners, for

the vacation or reduction of the assessment above mentioned
81 be affirmed with ten dollars costs and disbursements to the city of New York, and the said appeal having been duly argued before the court of appeals, and the court of appeals having ordered

and adjudged that the said order so appealed from as aforesaid be affirmed with costs, and an order having been duly entered in the office of the clerk of this court on the 29th day of June, 1900, making the order and judgment of the court of appeals the order and judgment of this court, and the costs of the city of New York having been duly taxed at the sum of $119.02; now, upon motion of John Whalen, corporation counsel, it is

Adjudged that the order so appealed from as aforesaid be and the same hereby is affirmed; and it is

Further adjudged that the City of New York recover of the above-named petitioners, The New York Central and Hudson River Railroad Company, as lessees, and The New York and Harlem Railroad Company, as owners, the sum of $119.02 the amount of its costs and disbursements, and that it have execution therefor.

Dated, New York, October 18, 1900.

WM. SOHMER, *Clerk.*

82 [Endorsed:] New York supreme court. County of New York. In the matter of the petition of The N. Y. Central & Hudson R. R. R. Co., *et al.*, petitioners, to vacate assessments (1) for reg., etc., Vanderbilt Ave. east, from the ward line to 177th street, etc. Copy of judgment and notice of entry. John Whalen, corporation counsel, No. 2 Tyron row, borough of Manhattan, New York city.

83 STATE OF NEW YORK, *County of New York,* } ss:

I, William Sohmer, clerk of said county and also clerk of the supreme court, a court of record held therein, do hereby certify that I have compared the annexed copy of remittitur, issued by and from the court of appeals, and of the respective papers whereon the said appeal was heard and determined as in and by the said remittitur set forth, filed in this office on the 29th day of June, 1900, the order of this court pursuant to the said remittitur, entered of date June 29, 1900, and the judgments in pursuance of said order, entered of date October 29, 1900, respectively, and that the same is a correct transcript from and of the whole of said originals.

In testimony whereof I have hereunto set my hand and affixed my official seal this 11th day of December, 1900.

[Seal New York.]

WM. SOHMER, *Clerk.*

M. J. D.

{ Ten-cent United States internal-revenue stamp, canceled Dec. 11, 1900. W. S. }

84 [Endorsed:] Clerk's certificate to remittitur, etc.

85 Supreme Court, Appellate Division, First Judicial Department.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23d and 24th Wards to 177th Street, Confirmed February 17, 1899.

I, Charles H. Van Brunt, presiding justice of the appellate division of the supreme court of the State of New York, first judicial department, do hereby certify that I was such presiding justice of said court at and upon the hearing, determination and decision in and by said court of the above-entitled cause, upon and concerning which the opinion was announced by Mr. Justice McLaughlin on March 9, 1900, as appears in and by the said case as appealed to the court of appeals. I do further certify that the printed brief presented and submitted by counsel for and on behalf of the said respective railroad companies, petitioners and appellants, at and upon the said hearing of said cause in and by the said supreme court, ap-
86 pellate division, contained, among others, the following matters, to wit:

"The claim of the city is not only that we are deprived of certain particular remedies, but that the result of the legislation is to deprive us of every affirmative remedy which we might otherwise have had. This cannot be.

A law which deprives a party of all legal remedy must necessarily be void. Cooley's Constitutional Limitations (6th ed.), 350, 442 and 443; Lennon *vs.* Mayor, 55 N. Y., 361; Taylor *vs.* Porter, 4 Hill, 144.

In Jex *vs.* Mayor, 103 N. Y., 536, where the act as amended by chapter 312 of the Laws of of 1874, was under discussion, it is said, on page 540:

'The act of 1874 did not in terms, and could not have been intended to take away all remedy to recover back money wrongfully extorted under color of an illegal assessment.'

And on page 541, discussing the question as to whether it was necessary that the assessment should have been vacated before the money could be recovered back, it is said:

'If, however, the vacation of the assessment was necessary, that relief may be had in this action, in connection with relief for the recovery of the money which the plaintiff's testator was illegally compelled to pay.'

This was a plain intimation that notwithstanding the prohibition in the act of 1874, the assessment could have been vacated in an action at law.

The corporation counsel asserts that the petitioners are not deprived of all remedy, because they still would have a right to resist

either an action on the part of the city to recover the amount of the assessment, or to resist the entry of any purchaser under a sale by the city for the amount of the assessment. These, however, are defenses. The city may take such time as it sees fit to pursue either of these courses, and in the meantime the petitioners must sit by and incur the risk of the large interest, penalties and forfeitures which may result under the provisions of the statute. In the case of a private owner he may be prevented from making a sale of his property, or of obtaining a loan upon it and thereby putting it to such use as he may desire. In the case of the petitioner, The New York Central and Hudson River Railroad Company, it must take the risk of a forfeiture of its lease (fol. 122) which provides that—

'It will pay the taxes, charges and assessments, ordinary and extraordinary, that may be imposed or assessed in any way on said railroad, branch, or property, or any part thereof, or upon or against the said party of the first part by reason thereof' (page 5 of the lease).

87 This they cannot be compelled to do; this, the law does not compel them to do; and it is insisted that the statutes under consideration do not and were not intended to leave property-owners in this helpless condition.

* * * * * * *

Point three.

If, by prohibiting judicial review, the result of section 962 is to enable the assessors to assess property for local improvements without reference to the benefits conferred upon the property by such improvements, that section is unconstitutional.

We have, heretofore, shown that a statute which authorizes assessments for local improvements other than in accordance with the benefits conferred, is unconstitutional and void.

Norwood *v.* Baker, 172 U. S., 269.

It cannot possibly make any difference whether the vice is in the statutory direction as to the method to be pursued by the assessors in making the assessment, or whether the statutory direction being correct, the same result is reached by other provisions of the statute. It is conceded that the statutory direction, both in the consolidation act (sec. 878) and in the Greater New York charter (sec. 946), is lawful. They both direct that the property shall be assessed in accordance with the benefit conferred by the improvement. Section 962 is a part of the same statute. If by reason of its provisions the assessors are enabled to do, indirectly what they are not directly authorized to do, that is, to assess property irrespective of the benefits conferred, the result is the same and the statute must fall."

Witness my hand officially this 3rd day of December, 1900.

CHARLES H. VAN BRUNT,
Presiding Justice.

88 STATE OF NEW YORK, }
County of New York, } ss.:

I, Alfred Wagstaff, clerk of the said appellate division of the supreme court, being a court of record held in the said county, do hereby certify that the Honorable Charles H. Van Brunt was on the day of the date last mentioned in the above and foregoing certificate the presiding justice of the appellate division of the supreme court of the State of New York, first judicial department, and that the signature thereto is his genuine signature.

In testimony whereof I have hereunto set my hand and official seal the 3d day of December, 1900.

[SEAL.] ALFRED WAGSTAFF, *Clerk.*

Due service of the above and foregoing certificate admitted this 16th day of January, 1901.

JOHN WHALEN,
Corporation Counsel, Attorney for The City of New York, Defendant in Error.

89 [Endorsed:] Supreme court, appellate division, first judicial department. In the matter of the petition of The N. Y. C. & H. R. R. R. Co., as lessee, and The N. Y. & Harlem R. R. Co., as owner, to vacate assessments: 1. For regulating and grading setting curbstones, etc. in Vanderbilt Ave. east, from ward line to 177th St., confirmed Feb. 17, 1899; 2. For paving Park Ave., otherwise Vanderbilt Ave. east, from the division line bet. the 23d and 24th wards to 177th St., confirmed Feb. 17, 1889. Certificate by the presiding justice in respect to certain portions of petitioners' brief.

90 In the Court of Appeals.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Crosswalks in Vanderbilt Avenue East from Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23d and 24th Wards to 177th Street, Confirmed February 17, 1899.

I, Alton B. Parker, chief judge of the court of appeals of the State of New York, and having presided as such at and upon the hearing, determination and decision of the above-entitled cause in and by the said court, do hereby certify that in and of the printed brief and argument presented and submitted by counsel for and on behalf of the said petitioners and appellants, The New York Central and Hudson River Railroad Company and The New York and Harlem Railroad Company, at and upon the said hearing were, among others, the following matters, to wit:

"The claim of the city is not only that we are deprived of certain particular remedies, but that the result of the legislation is to deprive us of every affirmative remedy which we might otherwise have had. This cannot be.

A law which deprives a party of all legal remedy must necessarily be void. Cooley's Constitutional Limitations (6th ed.), 350, 442 and 443; Lennon *vs.* Mayor, 55 N. Y., 361; Taylor *vs.* Porter, 4 Hill, 144.

91 In Jex *vs.* Mayor, 103 N. Y., 536, where the act as amended by chapter 312 of the Laws of 1874 was under discussion, it is said, on page 540:

'The act of 1874 did not in terms, and could not have been intended to take away all remedy to recover back money wrongfully extorted under cover of an illegal assessment.'

The corporation counsel asserts that the appellants are not deprived of all remedy, because they still would have a right to resist either an action on the part of the city to recover the amount of the assessment, or to resist the entry of any purchaser under a sale by the city for the amount of the assessment. These, however, are defenses. The city may take such time as it sees fit to pursue either of these courses, and in the meantime the petitioners must sit by and incur the risk of the large interest, penalties and forfeitures which may result under the provisions of the statute. In the case of a private owner he may be prevented from making a sale of his property, or of obtaining a loan upon it and thereby putting it to such use as he may desire. In the case of the petitioner, The New York Central and Hudson River Railroad Company, it must take the risk of a forfeiture of its lease (fol. 122), which provides that

'It will pay the taxes, charges and assessments, ordinary and extraordinary, that may be imposed or assessed in any way on said railroad, branch, or property, or any part thereof, or upon or against the said party of the first part by reason thereof' (page 5 of the lease).

This they cannot be compelled to do; this, the law does not compel them to do; and it is insisted that the statutes under consideration do not and were not intended to leave property-owners in this helpless condition.

The interpretation of the successive statutory provisions prescribing and regulating the remedy afforded to a property-owner believing himself aggrieved by assessment, must be undertaken in the light of the peculiar subject-matter to which the various provisions have relation. Regard is also to be had to the distinction between what the legislature may and what it may not do or authorize the doing of. The feature which distinguishes local assessments from general taxation is that by the former the tax-payer is deemed to have received compensation for the general tax exacted from him in and through the general benefits resulting to him in common with other members of the community from the maintenance of government by the body politic, but for the latter he is deemed to receive compensation through and by means of special benefit resulting to his property by means of the local improvement, to the extent to

92 which contribution is exacted from him in the form of a special assessment. The fundamental principle uniformly recognized in the enforcement of such assessment is that its imposition must not have been any greater measure than the manifest special benefits accruing to his property by means of the improvement. The detail of procedure by which the measure of benefit and assessment respectively are to be in the first instance ascertained and declared, it is incumbent upon the legislature to provide for by the legislative enactment. These matters of administrative detail the legislature may well find it desirable to change from time to time as experience may suggest, but the underlying principle upon which the assessment must stand and be supported, if it can be supported at all, is not subject to legislative control. As is tersely stated by Judge Cooley in his great work on Constitutional Limitations, 'administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen.' Cooley's Constitutional Limitations (6th ed.), page 434.

Legislative enactment is to be interpreted and construed upon the hypothesis that the legislature has in its enactments had due regard for these limitations upon its power, and that interpretation to be given to the language promulgated by it which will render it conformable to, rather than violative of, the rule of State and Federal constitution.

* * * * * * *

The case of the Elm Street Widening, New York Law Journal of February 8, 1895, page 1163, was quoted from and relied upon in the brief of counsel for the city in the court below, wherein he speaks of it as 'a case much more extreme than the present one.' He leaves to conjecture as to in what respect he so regards it. It was more extreme only in that it expressed more clearly the legislative intent to substitute a more summary and expeditious remedy than that theretofore existing. The statutes there under consideration were sections 952 to 1008 of the consolidation act, as amended by chapter 660 of the Laws of 1893, and related particularly to the amendments of that year. The objection made to the enactment was that by the retention of the old provisions with the new ones the enactment was so defective and contradictory in its provisions that a land-owner would not be assured of a prompt and complete remedy, and that, therefore, the provision for the taking of private property thereunder was unconstitutional. The rule giving effect to the later provision was thus resorted to by the court in favor of the support and enlargement of the remedy, so that its application as well as its weight and effect were the opposite of what the counsel of the municipality is here contending for. Indeed, in so far as the Elm Street Widening case is authority at all here, it is against the proposition for which the city's counsel relies upon it for his contention here, in that, while sustaining the constitutionality of the act for the purpose of the taking of private property

by the city, it recognizes the principle that the city's
93 taking of property would not be sanctioned by the court if the court found that the legislation did not preserve to the property-owner such plain and adequate remedy as the guarantees of the Constitution fairly entitle him to. Here the contention of the city's counsel is for such interpretation of the enactment in question as shall sustain the taking of private property and deny to the owner in all matter of substance the protection of his property rights which the constitutional provisions were designed to afford. The citation is, to say the least of it, an inopportune one for the purpose for which it was relied upon.

Point three.

If, by prohibiting judicial review, the result of section 962 is to enable the assessors to assess property for local improvements without reference to the benefits conferred upon the property by such improvements, that section is unconstitutional.

A statute which authorizes assessments for local improvements, other than in accordance with the benefits conferred, is unconstitutional and void.

Norwood *vs.* Baker, 172 U. S., 269.

That case holds that the only principle justifying the levying of assessments for local improvements is

'that the property upon which they are imposed is peculiarly benefited, and, therefore, the owners do not in fact pay anything in excess of what they receive by reason of such improvements.'

* * * * * * *

It cannot possibly make any difference whether the vice is in the statutory direction as to the method to be pursued by the assessors in making the assessment, or whether the statutory direction, being correct, the same result is reached by other provisions of the statute. It is conceded that the statutory direction, both in the consolidation act (sec. 878) and in the Greater New York charter (sec. 946), is lawful. They both direct that the property shall be assessed in accordance with the benefit conferred by the improvement. Section 962 is a part of the same statute. If by reason of its provisions the assessors are enabled to do indirectly what they are not directly authorized to do, that is, to assess property irrespective of the benefits conferred, the result is the same and the statute must fall.

If, therefore, the court finds that it is obliged to so interpret and apply the provisions of the statutes referred to as to hold that the court is thereby precluded from affording relief, then and in
94 that case we submit that the statute as a whole upon this subject operates to impose a burden upon the property of complainant in the way of colorable assessment, without regard to special benefit, and thus operates to take the property of complainant without due process of law, and to deprive it of protection of the laws.

The statute makes the assessment a lien on the property assessed,

and requires that public notice of such lien be given by advertisement (charter, §§ 1017 and 1018); and it is to be borne in mind that there is practically no limitation upon the period of time that the municipality may delay enforcement and still retain its lien for, and right to enforce, payment of the assessment.

In the carrying of these statutory provisions into the charter of New York city there was added to the former provisions carried into section 962 this, to wit, 'the provisions of this section shall apply to actions to recover money paid for assessments, and the amount recovered shall be limited to the excess over the fair value or fair cost of the improvement.' This, evidently, was to meet the difficulty encountered by the city in the Poth case, 151 N. Y., 16. Thus, whatever rule this legislation itself provided, whether the strict one contended for by the able counsel on behalf of the corporation of the city of New York, or the more liberal one above contended for, whatever the rule is, it is applicable as well to actions seeking recovery back of assessments paid as to those seeking vacation of the assessments without payment.

The consequence is that if the remedy here sought is not available, the aggrieved party, although pleading and proving all that the statute seems to require, as hereinabove stated, must nevertheless be subjected to having his property covered by a colorable lien and charge for such indefinite time as the municipality may see fit to forego attempt to enforce payment. Manifestly if the infirmity in the assessment does not appear upon the face of the record, and evidence other than the record has to be resorted to for proof of that infirmity, the law thus interpreted holds out an inducement to the municipal authorities to defer proceedings to enforce payment of the assessment until, by lapse of time, the evidence of the infirmity shall be no longer available. During all this time that which gives value to the property, to wit: the right and power of a reasonably free and untrammeled disposal of it, is effectually and to every intent and purpose taken and kept from the owner. If it is among the powers of the municipality, through its board or tribunal, charged with assessments of property for the expense of local improvements, to impose a colorable though invalid charge and hold a colorable though invalid lien therefor, and postpone indefinitely the enforcement thereof, and during such delay the thereby aggrieved owner is without remedy to clear his property of such colorable burden, and his power of disposal of his property is in
95 such degree hampered as to constitute practical coercion of payment of the colorable though invalid charge against him. This is inevitably the operation of the law as contended for by counsel on behalf of the corporation of the city of New York.

If the language of the legislation is such as to afford the court no alternative, but to give it such interpretation and effect as this, the law is manifestly violative of complainant's property rights as if it operated to take the physical property itself and deprive complainant thereof without compensation.

The case of Wynehamer *vs.* The People, 13 N. Y., 378, presented among other questions, that of the constitutionality of the act 'to

prevent intemperance, pauperism and crime,' in that it interfered with the disposal of that class of property to which the act had reference.

Speaking upon this subject Comstock, J., says:

'Now, I can form no notion of property which does not include the essential characteristics and attributes with which it is clothed by the laws of society. In a state of nature, property did not exist at all. "Every man might then take to his use what he pleased, and retain it if he had sufficient power, but when men entered into society, and industry, arts and sciences were introduced, property was gained by various means, for the securing whereof, proper laws were ordained." (Tomlyn's Law Dic., Property; 2 Bl. Comm. 34.) Material objects, therefore, are property, in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are fundamentally the right of the occupant or owner to use and enjoy them exclusively, and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so whatever removes the impression, destroys the notion of property, although the things themselves may remain physically untouched.

Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment. Thus Blackstone says (1 Comm., 138), "The third absolute right of every Englishman is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." Chancellor Kent says (2 Comm., 320), "The exclusive right of using and transferring property, follows as a natural consequence from the perception and admission of the right itself." And again (p. 326), "The power of alienation of property is a necessary incident to the right, and was dictated by mutual convenience and mutual wants." By another author property is defined as an "exclusive right to
96 things, containing not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or giving them away to any other person without consideration, or even throwing them away." (Bouvier Law Dic. tit. Property.) These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its attributes, incapable of sale, and placed without the protection of law, it were well that the attempt should be made.'

The operation of the law is no less mischievous and no less within the inhibition of the Constitution merely because it accomplishes the effects above stated by indirection instead of in and by such direct language as that to which the court had reference in the case last above cited.

* * * * * * * *

If, therefore, section 962 of the charter deprives the owner of all remedy by means of which an assessment actually void upon his property may be vacated, it operates to deprive him of property, and

the effect is the same as if the statute directly authorized the making of a void assessment.

But if the effect of the statute is to take from the owner all remedy, it is invalid for another reason; for it is beyond the power of the legislature to deprive the owner of all remedies.

'It has been held that the legislature may even take away a common-law remedy altogether without substituting any in its place, if another and efficient remedy remains.'

Cooley on Constitutional Limitations, 6th edition, page 349.

'But a law which deprives a party of all legal remedy must necessarily be void.'

Id., page 350."

Witness my hand officially this 13th day of Nov., 1900.

(S'g'd) ALTON B. PARKER, *Ch. J.*

Court of Appeals, Clerk's Office.

ALBANY, *November 13th*, 1900.

97 I, William H. Shankland, clerk of the court of appeals of the State of New York, being a court of record held therein, do hereby certify that the Honorable Alton B. Parker was upon the day of the date of the above and foregoing certificate the chief judge of the said court and that the signature thereto is his genuine signature.

In testimony whereof I have hereunto sey my hand and official seal the 13th day of November, 1900.

[SEAL.] (S'g'd) W. H. SHANKLAND, *Clerk.*

Due service of the above and foregoing certificate admitted this 16th day of January, 1901.

JOHN WHALEN,
Corporation Counsel,
Attorney for The City of New York, Defendant in Error.

98 [Endorsed:] In the court of appeals. Matter of Vanderbilt avenue. Copy certificate of the chief judge, court of appeals.

99 STATE OF NEW YORK, }
Court of Appeals. }

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating, &c., Vanderbilt Avenue East; (2) for Paving Park Avenue.

"Order affirmed with costs, on opinion below. Parker, Ch. J., O'Brien, Bartlett, Vann & Cullen, JJ., concur. Haight & Landon, JJ., dissent. No opinion."

OFFICE OF THE STATE REPORTER, ALBANY, NEW YORK.

I, Edwin A. Bedell, "State reporter," of the State of New York, and as such the official reporter of the court of appeals of said State, and the custodian of the original memorandums of the decisions of said court, do hereby certify that as such reporter I have in my custody the original memorandum of the decision of the court of appeals in the above-entitled cause, rendered June 22, 1900, as delivered to me by the judges of said court; that I have carefully compared the above and foregoing with the said original memorandum, and do hereby certify that the above and foregoing is a full and true copy of the said original memorandum. I do further certify
100 that no other or further opinion was announced or rendered by the said court of appeals in said cause.

In witness whereof, I have hereunto set my hand officially this 29 day of September, A. D., 1900.

EDWIN A. BEDELL,
State Reporter.

STATE OF NEW YORK, }
Court of Appeals. }

CLERK'S OFFICE, ALBANY, NEW YORK.

I, William H. Shankland, clerk of the court of appeals of the State of New York, do hereby certify that Edwin A. Bedell, was on the twenty-second day of June, A. D., 1900, and from thence hitherto, and is "State reporter" of the State of New York, and as such the official reporter of the court of appeals of said State, and custodian of the memorandums of the decisions of said court. I do further certify that the above and foregoing purported signature of the said Edwin A. Bedell is his genuine signature, and that the said certificate of the said State reporter is entitled to full faith and credit.

In witness whereof, I have hereunto set my hand officially, and the seal of said court, this 29th day of September, A. D., 1900.

[SEAL.] W. H. SHANKLAND, *Clerk.*

101 [Endorsed:] State of New York, court of appeals. In the matter of the petition of the N. Y. C. & H. R. R. R. Co. as lessee, and the N. Y. & Harlem R. R. Co., as owner, to vacate assessments (1) for regulating, &c., Vanderbilt avenue east; (2) for paving Park avenue. Copy of memorandum of court of appeals. Ira A. Place, attorney for appellants, Grand Central station, borough of Manhattan, N. Y. city, N. Y.

102 Due service of copy of the foregoing certified excerpt from brief of counsel for railroad companies in supreme court, appellate division, certified excerpt from brief of counsel for railroad companies in the court of appeals, and certified memorandum of the court of appeals, is acknowledged this 16th day of January, 1901.

JOHN WHALEN,
Corporation Counsel, Attorney for The City of New York, Defendant in Error.

103 [Endorsed:] Clerk's certificate to briefs & court of appeals memorandum.

104 *Petition for Writ of Error to the Supreme Court of the State of New York.*

In the Supreme Court of the United States.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23d and 24th Wards to 177th Street, Confirmed February 17, 1899.

To the honorable justices of the Supreme Court of the United States:

Come now the said petitioners, The New York Central and Hudson River Railroad Company and The New York and Harlem Railroad Company, and each of them, by their attorney, and complain that in the record and proceedings had in the above-entitled cause, and also in the rendition of the final order and judgment in the said cause, in the supreme court of the State of New York, sitting in New York county, first judicial department, at the March term thereof, A. D. 1900, to wit: March 9, 1900, wherein was drawn in question the validity of a statute of said State, and the validity of an authority exercised under said State, on the ground of their depriving petitioners of their property rights without due process of law, and thus being repugnant to the Constitution of the United States, and the decision of the said court was in favor of such their validity, as also in the final order and judgment of the court of appeals of the State of New York, to which last-mentioned court the said cause was appealed by said petitioners, being the highest court of law and equity in said
105 State, and the highest such court in which a decision could be had in the said cause, to wit, on June 22d, A. D. 1900, affirming on appeal the said final order and judgment of the said supreme court of the State of New York, in the said cause between the said The New York Central and Hudson River Railroad Company and The New York and Harlem Railroad Company, petitioners, and plaintiffs in error, and the said The City of New York, respondent, and defendant in error, and in which said court of appeals was in manner aforesaid drawn in question the validity of the same statute of said State, and the validity of the same authority, exercised under said State, as depriving said petitioners of their property rights without due process of law, and thus being repugnant to the Constitution of the United States, and the decision of the said court of appeals was in favor of such their validity, and that in and by and in pursuance of the said judgment of affirmance and

order of mandate and remittitur of the said court of appeals of the State of New York, the record and proceedings in said cause were remitted to and now remain in the said supreme court of the State of New York before the justices thereof; and in pursuance thereof and of the statutes of the State of New York in such case made and provided, thereafter, to wit, on June 29 and Oct. 18, respectively, A. D. 1900, final order and judgment was rendered by and entered in the said supreme court, in said cause, in obedience to and in conformity with the said decision, order, judgment and remittitur of the said court of appeals; in all whereof manifest error hath happened to the prejudice and damage of the said The New York Central and Hudson River Railroad Company and the said The New York and Harlem Railroad Company, respectively.

106 Wherefore, the said petitioners, plaintiffs in error, and each of them, pray for the allowance of a writ of error, and for such other and further orders and process as may cause the record and proceedings aforesaid, with all things concerning the same, to be sent to the Supreme Court of the United States, that upon final hearing hereof the said error be corrected, and such other and further proceedings be ordered and had as according to law should be done.

IRA A. PLACE,
Attorney for Petitioners, Plaintiffs in Error.

THOMAS EMERY, *Of Counsel.*

Office & post-office address, 417 Grand Central station, New York city.

Writ of error allowed, and the amount of bond for costs on said writ of error is hereby fixed at $500.00 this 3d day of January, 1901.

BROWN,
Justice of Supreme Court United States.

107 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of New York, before some of you, rendered in the said supreme court and affirmed by the judgment of the court of appeals of the State of New York, being the highest court of law or equity in the State of New York, and being the highest court of law or equity of the said State in which a decision could be had in the said suit, and wherein the record, judgment and proceedings having been by the order of the said court of appeals of the State of New York remanded and remitted to the said supreme court of the State of New York; as also in the further record, proceedings and judgment had and rendered in the said cause in the said supreme court of the State of New York in obedience to and in accordance with the said order and mandate of the said court of appeals, between The New York Central

and Hudson River Railroad Company and The New York and Harlem Railroad Company, petitioners, and plaintiffs in error, and The City of New York, respondent and defendant in error, wherein was drawn in question the validity of a statute of said State, and the validity of an authority exercised under said State, respectively, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened to the great damage of the said The New York Central and Hudson River Railroad Company and The
108 New York and Harlem Railroad Company, respectively, plaintiffs in error, as by their complaint appears.

We, being willing that error, if any hath been, should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington within 30 days from the date hereof next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, — Justice of the Supreme Court of the United States, the 3d day of January 1901.

JAMES H. McKENNEY,

[SEAL.] *Clerk of the Supreme Court of the United States.*

Allowed by—

HENRY B. BROWN,

Associate Justice of Supreme Court United States.

109 Due service of copy of petition and writ of error admitted this 16th day of January, 1901.

JOHN WHALEN,

Corporation Counsel, Attorney for The City of New York, Defendant in Error.

110 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City of New York, New York, and John Whalen, corporation counsel, its attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the United States, wherein The New York Central and Hudson River Railroad Company and The New York and Harlem Railroad Company are plaintiffs, and you, The City of New York, are defendant in error, to show cause, if any there be, why the order and judgment in said writ of error men-

tioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Henry B. Brown, — justice of the Supreme Court of the United States of America, this 3d day of January A. D., 1901.

H. B. BROWN,
Justice of Supreme Court United States.

111 I hereby accept due and personal service of this citation on behalf of the City of New York this 16th day of January 1901.

JOHN WHALEN,
Corporation Counsel, Attorney for The City of New York, Defendant in Error.

112 [Endorsed:] Supreme Court of United States. In the matter of the petition of the N. Y. C. & H. R. R. R. Co. as lessee, and the New York and Harlem R. R. Co., as owner, to vacate assessments (1) for regulating, etc., Vanderbilt avenue east; (2) for paving Park avenue Petition for writ of error, writ of error & citation. Ira A. Place, attorney for appellants Grand Central station, borough of Manhattan, N. Y. city, N. Y.

113 49462.

New York Supreme Court, County of New York.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY and Another to Vacate Assessments.

Know all men by these presents that we, the New York Central and Hudson River Railroad Company and the New York and Harlem Railroad Company, as principals, and the National Surety Company, having an office and principal place of business at # 346 Broadway, borough of Manhattan, city of New York, as surety, are held and firmly bound unto the City of New York, in the sum of five hundred ($500) dollars to be paid to the said City of New York, to which payment well and truly to be made we bind ourselves and our successors and assigns, firmly by these presents.

Sealed with our seals and dated the 17th day of December, 1900.

Whereas, the above-named, The New York Central and Hudson River Railroad Company and The New York and Harlem Railroad Company, have sued out a writ of error to the Supreme Court of the United States, to reverse the judgment in the above-entitled cause by the supreme court of the State of New York, entered on the remittitur of the court of appeals of the State of New York, bearing date the 22nd day of June, 1900.

114 Now, therefore, the condition of the above obligation is such, that if the above-bounden The New York Central and Hudson River Railroad Company and The New York and Harlem Railroad Company, shall prosecute said writ to effect, and answer all costs and damages if they shall fail to make good their plea, then

this obligation to be void, otherwise to remain in full force and virtue.

Dated New York, December 17th, 1900.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

[SEAL.] By S. R. CALLAWAY, *President.*

Attest: E. D. WORCESTER, *Secretary.*

NEW YORK AND HARLEM RAILROAD COMPANY,

[SEAL.] By W. K. VANDERBILT, *President.*

Attest: E. V. ROSSITER, *Secretary.*

NATIONAL SURETY COMPANY,

[SEAL.] By ALEX. GREIG, *2nd Vice-President.*

Attest: WM. R. WORRALL, *Res. Ass't Secretary.*

Stamp.

115 49462.

STATE OF NEW YORK, *County of New York,* } *ss:*

On this 26th day of December, 1900, before me personally appeared S. R. Callaway president of the New York Central and Hudson River Railroad Company, the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

LEIGH BEST,

[SEAL.] *Notary Public, New York County.*

STATE OF NEW YORK, *County of New York,* } *ss:*

On this 26 day of December, 1900, before me personally appeared W. K. Vanderbilt, president of the New York & Harlem Railroad Company, the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

EDGAR FREEMAN,

[SEAL.] *Notary Public.*

116 49462.

COUNTY OF NEW YORK, *ss:*

On this 17th day of December, 1900, before me personally appeared Alex. Greig 2nd vice-president of the National Surety Com-

pany, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the county of New York; that he is the 2nd vice-president of the National Surety Company, the corporation described in and which executed the above instrument; that he knows the corporate seal of said company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as 2nd vice-president of said company by like authority; and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3, chapter 720 of New York Session Laws of 1893. And the said Alex. Greig further said that he is acquainted with Wm. R. Worrall and knows him to be the res. ass't secretary of said company; that the signature of the said Wm. R. Worrall subscribed to the said instrument is in the genuine handwriting of the said Wm. R. Worrall and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said Alex. Greig 2nd vice-president.

[SEAL.]

J. T. WEMYSS,
Notary Public, 42, *N. Y. C.*

Copy of By-law.

Be it remembered, that at a regular meeting of the board of directors of the National Surety Company, duly called and held on the 6th day of February, 1900, a quorum being present, the following by-law was adopted:

"ARTICLE XIII, SEC. 1. Signatures required.—All bonds, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, shall be signed by the president, the vice-president, the second vice-president, a resident vice-president, or an attorney-in-fact, and, except when signed by an attorney-in-fact, shall have the seal of the company affixed thereto, duly attested by the secretary, an assistant secretary or a resident assistant secretary. The vice-president, second vice-president and resident vice-presidents shall each have authority to sign such instruments whether the president be absent or incapacitated or not; and the assistant secretaries and resident assistant secretaries shall each have authority to seal and attest such instruments, whether the secretary be absent or incapacitated or not. All such instruments executed as herein provided shall be as binding upon the company as if the same were signed by the president, duly sealed and attested by the secretary."

COUNTY OF NEW YORK, *ss:*

I, Wm. R. Worrall res. ass't secretary of the National Surety Company, have compared the foregoing by-law with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original by-law.

Given under my hand and seal of the company, at the county of New York, this 17th day of Dec. 1900.

[SEAL.] WM. R. WORRALL,
Res. Ass't Secretary.

117 The within bond approved.

BROWN, *Asso. Just.*

118 SIR: Please take notice that within is a copy of bond filed with the clerk of the supreme court of New York county this 17th day of January, 1901.

IRA A. PLACE,
Attorney for Plaintiffs in Error.

Service of a copy of the within bond and notice admitted this 16th day of January, 1901.

JOHN WHALEN,
Corporation Counsel, Attorney for The City of New York, Defendant in Error.

119 *Assignment of Errors.*

In the Supreme Court of the United States.

In the Matter of the Petition of THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, as Lessee, and THE NEW YORK AND HARLEM RAILROAD COMPANY, as Owner, to Vacate Assessments (1) for Regulating and Grading, Setting Curbstones, Flagging, and Laying Cross-walks in Vanderbilt Avenue East from Ward Line to 177th Street, Confirmed February 17, 1899; (2) for Paving Park Avenue, Otherwise Vanderbilt Avenue East, from the Division Line between the 23d and 24th Wards to 177th Street, Confirmed February 17, 1899.

To the honorable justices of the Supreme Court of the United States:

Come now the said petitioners, plaintiffs in error, and file the following assignments of error upon which they and each of them will rely in and for their prosecution of the writ of error in the above-entitled cause.

That the said supreme court of the State of New York erred in rendering, and the said court of appeals of the State of New York erred in affirming the order and judgment wherein and whereby the provisions of sections 958, 959, 962 and 1017 of chapter 378 of the Laws of 1897 of the State of New York, and the authority exercised thereunder, were held valid, as not depriving plaintiffs of their property rights without due process of law, and hence not repugnant to the Constitution of the United States, and in pursuance whereof it was ordered and adjudged "that the motion or prayer of the petitioner be and the same hereby is denied with ten dollars costs to the city of New York."

That the said courts, respectively, erred in holding the said statu-

tory provisions valid as not depriving plaintiffs of their prop-
120 erty rights without due process of law and hence denying to the said petitioners the relief, order and decree prayed for by them in and by their petition in said cause, and in rendering judgment against them for costs and disbursements in and of the said cause.

That the said courts, respectively, erred in holding and deciding that by reason of and by virtue of the said statute of the State of New York, the said petitioners were, and each of them was, disentitled to have and maintain their said action, and to have the relief, order and decree, by them, respectively, in and by their said petition and suit prayed for.

That the said courts, respectively, erred in holding and deciding valid, as against the said petition and suit of said petitioners, and as not repugnant to the Constitution of the United States, the said authority exercised under the State of New York by means whereof the said liens were imposed, attached and subsisted against the property of the said petitioners, as complained of by the said petitioners in and by their petition in said cause.

That the said courts, respectively, erred in holding and deciding valid and not repugnant to the Constitution of the United States the said statute of the State of New York by the tenor whereof petitioners are denied relief against and concerning the assessments and the subsisting liens thereof, of which they complained in and by their petition in said cause.

That the said courts, respectively, erred in holding and deciding to be valid and not repugnant to the Constitution of the United States the said statute of the State of New York by the tenor whereof said petitioners were and are denied protection of their vested property rights against the liens of assessments laid
121 and levied against their property without regard to, and in the absence of any benefit resulting to said property from the local improvements for the cost of which the said assessments were imposed and levied.

That the said courts, respectively, erred in holding and deciding, as against the complaint and prayer of said petitioners, that the said authority in that behalf exercised under the State of New York whereby the said assessments were imposed and the liens thereof attached and subsisted, against the property of petitioners, was thus exercised under authority of law.

That the said courts, respectively, erred in holding and deciding that the said statute of the State of New York in that behalf constituted authority of law for the imposition, attaching and subsistence of the liens of the assessments in and by the petition of the said petitioners complained of.

That the said courts, respectively, erred in holding and deciding valid and not repugnant to the Constitution of the United States the aforementioned provisions in that behalf of the said statute of the State of New York by the tenor whereof the vacating of the assessments complained of, or the removal of the cloud cast by the apparent lien thereof upon petitioners' title is forbidden.

That the said courts, respectively, erred in holding and deciding valid and not repugnant to the Constitution of the United States, the provisions in that behalf, of the said statute of the State of New York, by the tenor whereof the liens of the assessments in petitioners' petition complained of are declared to continue until the said assessments are paid; and, petitioners forbidden to, by any suit, process, proceeding or method have the judgment of any court
122 upon the question of the validity of such lien, unless and until the sale by the city of New York of petitioners' property for satisfaction of such lien, and the setting up of claim of title under such sale.

That the said courts, respectively, erred in that the said order and judgment were for and in favor of the said The City of New York, respondent, when the same should have been for and in favor of the said The New York Central and Hudson River Railroad Company, and The New York and Harlem Railroad Company, respectively, petitioners.

In order that the foregoing assignment of errors may be and appear of record, the petitioners present the same to the court, and pray that such disposition be made thereof as in accordance with law and the statutes of the United States in such cases made and provided.

IRA A. PLACE,
Attorney for Plaintiffs in Error.

THOMAS EMERY, *Of Counsel.*

364.

STATE OF NEW YORK, } ss:
County of New York, }

I, William Sohmer, clerk of the said county, and clerk of the supreme court of said State for said county, do certify, that I have compared the preceding with the original record, in the matter of the petition of the N. Y. C. — H. R. R. R. &c. &c. filed Jan. 17th, 1901 on file in my office, and that the same is a correct transcript therefrom, and the whole of such original.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 18th day of Jan. 1901.

Seal New York.

WM. SOHMER, *Clerk.*

{ Ten-cent United States internal-revenue stamp, canceled Jan. 18, 1901. W. S. }

123 [Endorsed:] Supreme Court of United States. In the matter of the petition of the N. Y. C. & H. R. R. R. Co., as lessee, and the N. Y. & Harlem R. R. Co., as owner, to vacate assessments (1) for regulating, etc., Vanderbilt avenue east; (2) for paving Park avenue. Assignment of errors. Ira A. Place, attorney for appellants, Grand Central station, borough of Manhattan, N. Y. city, N. Y.

Endorsed on cover: File No. 18,028. New York supreme court. Term No. 234. The New York Central and Hudson River Railroad Company and The New York and Harlem Railroad Company,